82-2033

No.

In The Supreme Court of the United States

OCTOBER TERM, 1983

ASSOCIATED BUILDERS & CONTRACTORS, Northern California and Golden Gate Chapters, individually and on behalf of their members; OPINSKI CONSTRUCTION; THORNHILL CONSTRUCTION COMPANY; FRANK TORRES CONSTRUCTION COMPANY; WHITAKER CONSTRUCTION, INC.; GREAT WESTERN CONSTRUCTION, INC.; DRW CONSTRUCTION; WILLARD ENTERPRISES, INC.; on behalf of themselves and all others similarly situated,

Petitioners,

vs.

CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA and GORDON W. HANSON; RICHARD CLARK; CHARLIE PETERSON; JAMES WHITTAKER; HOYLE HASKINS; L.E. BEE; RUSSELL POOL, individually and as trustees for said Carpenters Vacation and Holiday Trust Fund; CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) on behalf of itself and its member unions,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

THIERMAN, SIMPSON & COOK
Mark R. Thierman
50 California Street, Suite 2840
San Francisco, California 94111
Telephone: (415) 434-4672
(916) 442-3100

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

QUESTIONS PRESENTED

Whether Section 302 of the Labor Management Relations (Taft Hartley) Act of 1947, as amended, 29 U.S.C. §186, permits an employee benefit trust fund established thereunder to collect union dues and transfer such dues to a labor organization representing employees in an industry affecting commerce.

Whether an employer's payment to a labor union via a bank account owned and controlled by a jointly administered trust fund violates Section 302 of the Labor Management Relations (Taft-Hartley) Act of 1947, as amended, 29 U.S.C. §186.

Whether a bank may properly be considered the agent of an employer when the employer's monies are remitted to an account solely owned and controlled by a vacation and holiday trust fund established for the sole and exclusive purpose of providing vacation and holiday benefits pursuant to Section 302(c)(6) of the Labor Management Relations (Taft-Hartley) Act of 1947, as amended, 29 U.S.C. §186.

Whether an employer has standing under the Employee Retirement Income Security Act of 1974 (ERISA, 29 U.S.C. §§ 1001, *et seq.* (1976) to seek an injunction against a multiemployer benefit plan the assets of which are not used for the exclusive purpose of providing benefits to partipants in the plan and their beneficiaries and defraying the costs of administering the plan.

LIST OF ALL PARTIES

PETITIONERS

1. Associated Builders and Contractors, Northern California Chapter.
2. Associated Builders and Contractors, Golden Gate Chapter.
3. Opinski Construction.
4. Thornhill Construction Company.
5. Frank Torres Construction Company.
6. Whitaker Construction
7. Great Western Construction, Inc.
8. DRW Construction
9. Willard Enterprises, Inc.

RESPONDENTS

1. Carpenters Vacation and Holiday Trust Fund for Northern California.
2. Gordon W. Hanson, trustee of the Carpenters Vacation and Holiday Trust Fund.
3. Richard Clark, trustee of the Carpenters Vacation and Holiday Trust Fund.
4. Charlie Peterson, trustee of the Carpenters Vacation and Holiday Trust Fund.
5. James Whittaker, trustee of the Carpenters Vacation and Holiday Trust Fund.
6. Hoyle Haskins, trustee of the Carpenters Vacation and Holiday Trust Fund.
7. L.E. Bee, trustee of the Carpenters Vacation and Holiday Trust Fund.
8. Russell Pool, trustee of the Carpenters Vacation and Holiday Trust Fund.
9. Carpenters 46 Northern California Counties Conference Board of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and its member and affiliated District Council and Local Unions which are signatory to the 1980-1983 Carpenters' Master Agreement for Northern California.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES ***Page(s)***

TEXTS

OTHER

OTHER

Page(s)

No.

In The Supreme Court of the United States

OCTOBER TERM, 1983

ASSOCIATED BUILDERS & CONTRACTORS, Northern California and Golden Gate Chapters, individually and on behalf of their members; OPINSKI CONSTRUCTION; THORNHILL CONSTRUCTION COMPANY; FRANK TORRES CONSTRUCTION COMPANY; WHITAKER CONSTRUCTION, INC.; GREAT WESTERN CONSTRUCTION, INC.; DRW CONSTRUCTION; WILLARD ENTERPRISES, INC.; on behalf of themselves and all others similarly situated,

Petitioners,

vs.

CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA and GORDON W. HANSON; RICHARD CLARK; CHARLIE PETERSON; JAMES WHITTAKER; HOYLE HASKINS; L.E. BEE; RUSSELL POOL, individually and as trustees for said Carpenters Vacation and Holiday Trust Fund; CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) on behalf of itself and its member unions,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 10, 1983.

OPINIONS BELOW

The March 10, 1983 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 700 F.2d 1269, 112 LRRM 3001, and is reprinted in the Appendix hereto, *infra*, pp. 2 through 15. The prior orders and opinions of the United States District Court for the Northern District of California, also reprinted in the Appendix hereto, *infra*, are as follows:

(a) February 20, 1981, unreported Order Denying Motion For Preliminary Injunction, reprinted in the Appendix hereto, *infra*, pp. 16 through 20.

(b) September 28, 1981, unreported Order Denying Request For Reconsideration of Denial of Preliminary Injunction, reprinted in the Appendix hereto, *infra*, pp. 21 and 22.

(c) September 28, 1981, unreported Order Denying Injunction Pending Appeal, reprinted in the Appendix hereto, *infra*, pp. 23 and 24.

(d) November 25, 1981, unreported Judgment And Order granting Defendants motions for dismissal on the ground of mootness and for summary judgment, reprinted in the Appendix hereto, *infra*, pp. 25 and 26.

JURISDICTION

The judgment of the Court of Appeals was entered March 10, 1983, and is reprinted in the Appendix hereto, *infra*, p. 27. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

(1) Labor Management Relations (Taft-Hartley) Act, §302, 29 U.S.C. §186. Reprinted in the Appendix hereto, *infra*, at pp. 28 through 32.

(2) Relevant portions of the Employee Retirement Income Security Act of 1974, as amended, §§403, 404, 406, 409, 502, 29 U.S.C. §§1002, 1103, 1104, 1106, 1109, 1132 (1976). Reprinted in the Appendix hereto, *infra*, at pp. 33 through 40.

STATEMENT OF CASE

Petitioners herein seek, by this action, to test the structural validity of Respondent Carpenters' Vacation and Holiday

Trust Fund for Northern California under Section 302 of the Labor Management Relations (Taft-Hartley) Act of 1947, as amended, (29 U.S.C. §186, hereinafter "LMRA") on the grounds that said Trust Fund pays money directly to the Union in the form of "Supplemental Dues" or a "work fee," contrary to the prohibitions of the statute. Section 302 prohibits an employer from paying any monies to union, and prohibits a union from either demanding or accepting such money unless certain conditions exist. Thus, Section 302(c)(6) permits an employer to contribute money to a jointly administered trust fund established only for the exclusive purpose of pooled vacation, holiday, severance or similar benefits, or defraying the costs of apprenticeship or other training program (29 U.S.C. §186(c) (6)).

Petitioners contend that the payment of money directly from the Vacation and Holiday Trust Fund to an employee representative (the Union) renders the Trust Fund structurally defective. An employee may authorize his employer to deduct union dues from the employee's wages ("dues check-off") (29 U.S.C. §186(c) (4)). However, Section 302 does not authorize any hybrid, dual purpose trusts, such as a vaction and holiday fund to pay dues directly to a union. Since a vacation and holiday trust fund exists solely for the stated purpose of providing the statutorily specified employee benefits, employer contributions to Respondent Trust Fund herein are not wages; but are pooled fringe benefits beyond the control of the individual employee. In addition, under 302(c)(4), each employer must receive a dues authorization card from each employee. This is not the case here. Consequently Respondent Vacation and Holiday Trust Fund may not pay monies to the Union as "dues," since no valid "dues check-off" exists. Employers who contribute to such structurally defective 302 trust funds have standing to seek to enjoin the illegal practices.

By allowing Respondent Trust Fund to act in this unlawful manner, the individual Trustees have violated their fiduciary duties under Sections 4 and 5 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001, *et seq.*, hereinafter referred to as "ERISA"). Specifically, 29 U.S.C. Section 1104(a)(1) (ERISA §404(a) (1)) states that a fiduciary

shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, *for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.* Payment of monies by the Respondent Trustees to the Respondent Union is not for the exclusive purpose of providing benefits to the employees or defraying reasonable administrative expenses. In addition, Section 1106 of Title 29 (ERISA §406 (a) (1) (D)) provides that it is unlawful for the trustees of an employee benefit trust to pay money (or other thing of value) to any party in interest. Because the Respondent Union is an employee organization whose members are covered by the plan, Respondent Trust Fund is paying money to a party in interest within the meaning of 29 U.S.C. Section 1002(14 (ERISA §3(14)). Accordingly, by paying money to Respondent Union as a "work fee," the Respondent Trustees have breached their fiduciary duty since they have not operated the plan solely and exclusively for the benefit of participants as required by ERISA §403(c)(1), 29 U.S.C. §1103(c)(1). For this reason, the Respondent Trust Fund should be enjoined immediately from continuing the illegal practice of paying money to the Union as a "work fee" or "supplemental dues."

Obviously, the Trustees are in a conflict of interest situation vis-a-vis the "work fee" issue. As trustees, they each are personally liable for damages resulting from the breach of their fiduciary duties. ERISA §409(a), 29 U.S.C. §1109(a). Yet, the Trust itself must conform to the law and endeavor to rectify the past misconduct, including reimbursement and suit for indemnity against the individual Trustees. The present Trustees cannot be expected to sue themselves for breach of their fidicuary duties leading to acceptance of the "work fee" provision. Accordingly, the Court should appoint a qualified person both to marshall fund assets and to bring suit against named individual Trustees for indemnity, if appropriate. Therefore, Petitioners sought below a Court-appointed receiver to manage the fund assets *pendente lite*. Petitioners are contributors to the structurally defective fund and are being forced, by order of the Court below, to continue payment to an illegal trust fund. Petitioners seek relief because the Court below has ordered Petitioners to commit an illegal and criminal act.

For the reasons set forth herein, this Court should forthwith require the Court below to issue a preliminary injunction ordering Respondents to cease and desist from the unlawful activity of payment of money to the Respondent Union and appoint a receiver to manage the fund assets during the conduct of this litigation, and declare that Petitioners have no obligation to contribute to Respondent Trust Fund until the structural defect is corrected.

Statement of Facts

Petitioners' Amended Complaint alleges, *inter alintia*, that the illegal diversion of Vacation and Holiday Trust Fund monies directly to Respondent Union renders Respondent Trust Fund structurally defective. The details of this illegal diversion of monies from the Trust Fund to the Union are set forth in Section 43-A of the 46 Northern California Counties Carpenters' Master Agreement for Northern California, effective June 16, 1977 to June 15, 1980, with its renewal effective June 16, 1980 to June 15, 1983 (hereinafter referred to as the "Carpenters' Master Agreement"); a copy of the 1977-1980 agreement was annexed to the Complaint as Exhibit B. Section 43-A of the 1977-1980 Carpenters' Master Agreement states:

> "Work Fee. Effective for all work performed on or after January 1, 1978, it is agreed that upon written authorization, provided by the Union, as required by law, the amount of ten (10¢) cents per hour, for each hour paid for or worked, shall be deducted from the Vacation and Holiday benefit of each workman and remitted directly to the Union, or the appropriate Local Union or District Council of the Union, as the Union may from time to time direct. The amount of the deduction shall be specified on a statement transmitted to the workman. Such remittance shall be made to the Union not less than twelve (12) times per year. [Exhibit B of the Complaint at page 17].

Petitioners contended below that this "work fee" is a blatantly unlawful diversion of trust fund monies. Section 302 of the LMRA specifically states that it is illegal for a union to demand or receive or agree to accept any payment directly from an employer except pursuant to the fringe benefit excep-

tions of Section 302(c). Since Respondent Trust Fund is a vacation and holiday trust, it qualifies only under Section 302(c)(6); that section explicity states that such a trust fund must be used *exclusively* "for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs . . . " (29 U.S.C. Section 186(c)(6)). The Defendant Trust Fund fails to qualify as a vacation and holiday trust fund under Section 302(c)(6), since it pays Respondent Union ten cents (10¢) per hour as "supplemental dues" or as a "work fee," and such payments are not for the exclusive purposes delineated under LMRA Section 302(c)(6).[1] Accordingly, any demand by Respondent Union or Respondent Trust Fund acting as the Union's collection agent, that an employer pay money to this illegal fund, or Respondent Union's acceptance or receipt of such illegally diverted money, violates Section 302(b) of the LMRA which states:

> It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a) of this Section.[2]

Also asserted below was the fact that the work fee does not qualify as a "dues deduction" under Section 302(c)(4) of the LMRA. Section 302(c)(4) allows a dues deduction from an employer only if the money is deducted from *wages*, the *employer* has received a valid written authorization, and the money is or dues. Here, the money comes to the Union from the Trust Fund, not an employer; the money is deducted from the "benefit"—as opposed to wages; the *employer* never receives a written authorization, although the Trust Fund may; and the Union uses the money for both general purposes and political functions unrelated to collective bargaining. When the Petitioners first filed this lawsuit, such supplemental dues were voluntary, and *not* uniformly required by all locals of the

---

1 Effective January 1, 1981, the "Supplemental Dues" were increased to $.25 per hour.

2 Section 302(A) of the LMRA prohibits any payment from an employer to any employee representative (such as a union) except as provided by Section 302(c) of the LMRA.

union. Because the Respondent Union uses the money in part as a political war chest, it cannot be dues. The individual employers do *not* receive "dues check-off" authorization cards from the employees; rather a single card, deposited with the Trust Fund, (copy to the Bank) is used for all employers—whether members of a multiemployer association or individual employers (thereby effectively denying the employee the right to revoke the authorization when he changes employment). Indeed, the work fee is not a mandatory *dues* uniformly required of all members, but is a gift to the Union to be used for the Union's organizational purposes vis-a-vis other employers. Originally, when suit was filed, the "work fee" money went directly into the "vacation" trust fund, was commingled with other trust assets, did not earn interest, and was paid to the union monthly, although the remaining money was under the control of the individual employee only once a year when it was paid to him as "vacation" monies. In 1981, the system was changed cosmetically as explained below.[3]

The post-January 1981 plan merely inserted a trust fund collection agent (Lloyds Bank of California) as a "fiscal intermediary"; the individual employers now mail their combined Trust Fund and Supplemental Dues payments to the bank, the employers still send to the bank only one check made payable to the Carpenters Trust Fund; the bank (acting pursuant to the direction of the "owner of the account"—the Trust Fund) then divides the contribution and mails the Union its share of said monies with the remainder to the Trust Fund. In this endeavor, the Trust Fund completely controls the bank; the bank even pays the Union interest on its "dues" while waiting for the checks to clear before giving the Union its "cut" of the Trust Fund contributions. The individual worker never has the opportunity to "re-execute" or refuse to re-execute a dues check-off when he/she moves from one employer to another and Trust Fund machinery is used to collect union dues by way

3 On November 26, 1980, District Court Judge Spencer Williams stated in open court that he was "satisfied it's violated Section 302. . . ." Only after this statement by the Court did the Union take action. On February 23, 1981, the Union and the Associated General Contractors of California, Inc., and the Bay Counties General Contractors Association, Inc., reached an agreement to modify the Carpenters' Master Agreement so as to cosmetically change the "work fee."

of employer audits and suits for collection of deficiencies. The pre-January 1981 and post-January 1981 schemes are identical except that the post-January 1981 scheme added the subterfuge of a fiscal conduit (Lloyds Bank) which the Union and/or Trust Fund entirely controls.[5]

The decision of the United States Court of Appeals for the Ninth Circuit is based upon several factual errors, apparent from the record below. First, under the modified Supplemental Dues plan, monies are sent for both dues and trust fund contributions for *all* carpentry employees to the bank in one check made payable to the Carpenters Trust Fund. The bank then segregates the dues money from the trust fund moneyt, as directed by the trust fund. Contrary to the opinion below, the bank does not transmit to the trust fund once a month *additional* vacation monies for those who have refused to sign a check-off card. Instead, the complicated procedure is designed to ensure the individual employee and the employer never segregate the trust fund money from the union's money. In fact, an individual employer does not even know who has executed a dues check-off card and who has not.[6]

---

4 Although the Trust Fund amended its dues check-off procedure in early 1981, Respondents still use pre-1981 dues check-off authorization cards to justify employee contributions under the post-January 1981 plan, thereby, again denying employees the free choice guaranteed under Section 302(c)(4) of the LMRA.

5 In addition, Respondent Trust Fund uses its assets to collect delinquent dues and trust monies from employers. Because the employee cannot exercise control over the money in the trust fund, these after-tax dollars are not wages. Thus, not only does using a vacation and holiday trust as a vehicle for a dues check-off violate the "sole and exclusive purpose" provisions of Section 302(c)(6), this "dues check-off" fails to qualify under Section 302(c)(4) as well. Section 302(c)(4) is a narrow exception which explicity states that it is not illegal for an employer to pay money to a union:

> with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, that the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement whichever occurs sooner.

6 As can be seen from the original and modified supplemental dues deduction forms, exhibits 4 & 5 to the declaration of C. Bruce Sutherland included in excerpt of the record filed in the Ninth Circuit and reprinted in the appendix hereto, *infra*, pp. 46 and 47, the money for dues is segregated on the form for every employee, whether he signed a dues deduction or not, then is again combined with the nomral vacation trust fund payment and sent to the bank in a single check. The sum of column B plus column A together times the benefit rate equals the benefit rate times column B plus the benefit rate times column A.

A second factual flaw in the opinion of the Court below is the assumption that Petitioners Associated Builders and Contractors, Golden Gate and Northern California Chapters negotiated the Carpenters Master Agreement. As seen from the cover of the Carpenters Master Agreement in evidence below, and annexed as Exhibit B to the Complaint in this case, the Court of Appeals is confusing the Associated Builders and Contractors with the Associated General Contractors of California, an entirely separate organization. Petitioner Associated Builders and Contractors brought this action on behalf of itself and its members who are or were signatory to the Carpenters Master Agreement.

Third, Petitioners do not base their claim upon the fact that the dues amount fluxuates with the hours worked, but that initially, the system was voluntary and *not* uniformily required. Nor has Petitioner abandoned any claims for the return of money to the trust fund and/or the settlors of the funds, and/or the employees, as such claim was made both to the district court and in its brief to the Court of Appeals.

Contrary to the opinion of the Court of Appeals, the record below fully supports the allegation that trust assests are used to collect "supplemental dues." Exhibit 1 to the Declaration of C. Bruce Sutherland in Support of Motion, contained in excerpt of record filed in the Ninth Circuit and reprinted in the Appendix hereto, infra pp. 43 through 45, states:

> "Any delinquency in the payment of such [supplemental dues] and amount shall be subject to the same liquidated damage, interest and other delinquency provisons applicable to contributions to the Northern California Carpenter Funds." [p.44]

As can be seen from the diagram attached to Petitioners' Reply Brief to the Ninth Circuit as Exhibit A, and reprinted in the Appendix hereto, infra, pp. 41 and 42, both "vacation dues" check-off schemes vary significantly from lawful dues check-off procedures normally adopted by labor organizations. The Trust Funds and the Union have demanded and continue to demand payment to what remains a structurally defective fund. See, *e.g.*, *Carpenters Health & Welfare Trust Funds, et al. v. Opinski*, a related case still pending before Judge Spencer Williams, U.S.D.C. N.D. Cal. Case No. C-90 1107 SW. Under the provisions of the Section 502 of

ERISA 3 as amended by 1980 Multiemployer Pension Plan Amendments Act, (29 U.S.C. 1132), Respondents may actually claim attorney's fees and liquidated damages for collection of trust fund deficiencies. Clearly, Congress did not intend to award attorney's fees in actions to collect union dues.

C. Bruce Sutherland, Secretary of the Board of Trustees of Respondent Trust Fund, in his declaration filed in support of Respondents' Motion to Dismiss for Mootness, declares that Exhibit 8 to his declaration "is a description of the Revised Dues Supplement Arrangement Procedures which became effective January 1, 1981, and which have been in effect since that date." Exhibit 8 provides in material part:

Revised Dues Supplement Arrangement

Procedures effective January 1, 1981

1. *Signed Authorization Cards*
   a. To be sent directly to Bank.
   b. Bank sends to Fund Office for processing.
   c. Fund Office retains original cards and furnishes Bank with microfiche copies.
2. *Revocations*
   a. Requests sent directly to Bank.
   b. Bank sends to Fund Office for processing.
   c. Fund Office retains original and furnishes Bank with microfiche copies.
3. *Applications*
   a. *Fund Office* matches authorization cards on file with contributions by employer to the Supplemental Dues Option Account each month, after one month lag, to cover for bad checks and adjustments. [emphasis supplied]
   b. *Fund Office advises Bank as to amount to pay over to Conference Board based on signed authorization cards (as revised) on file; at the same time, the Fund Office advises the Bank as to the amount to pay over to the Conference Board on behalf of the Vacation and Holiday Trust Fund as vacation deductions based on old form authorization cards on file; balance to be transferred to Vacation and Holiday Fund Savings Account.* [emphasis supplied]

> c. Where a revised authorization card is on file for a carpenter who previously signed an old form authorization card, the old card will be marked "superseded" but will be retained by the Fund Office.
> d. *For both old and revised cards*, the Fund Office will apply deductions only to Funds held by Bank, i.e., April payment applies to funds received in February for January work month. [emphasis supplied]
> e. Fund Office furnishes Bank with microfiche details regarding transfer of funds to the Conference Board.
> f. Fund Office furnishes Conference Board with details by Local Union of Supplemental Dues Option payments *based on both old and revised cards* with an indication as to the type of card on file. [emphasis supplied]

Petitioners contend that the "modified approach" does nothing to rectify the structural defect in Respondent Trust Fund and that Petitioners' arguments regarding the defect made before the modification still apply with equal force and effect.[7] If the bank is anyone's agent, it is the agent of the Trust Fund. Furthermore, this modification has at no time been accepted by Petitioners herein, and the Court below ordered Petitioners to make contributions before this cosmetic modification was enacted. Thus, it is difficult to imagine how this slight of hand can moot the issues presented herein.

Existence of Jurisdiction Below.

Federal jurisdiction in the United States District Court for the Northern District of California, the court of first instance herein, was obtained pursuant to Sections 301–303 of the

7 The Trust Funds "advise" the bank with regard to every move the bank makes. In the same declaration, Sutherland notes that the Union has paid "[a]ll of the cost of services" which are "required in the implementation of the procedures described in Exhibit 8."

Labor Management Relations (Taft-Hartley) Act of 1947, as amended, (29 U.S.C. §§185–187) the Employee Retirement Income Security Act of 1974 (29 U.S.C. §§1001, *et seq.*) and 28 U.S.C. Section 1331.

REASONS FOR GRANTING WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE NEBRASKA SUPREME COURT

In 1982, the Supreme Court of the State of Nebraska addressed the issue of whether Section 302(c)(5) permits employer holiday trust fund contributions to be paid to a union as dues and assessments pursuant to employees' written authorizations. *Jones v. Commercial Federal Savings & Loan Assn.*, 319 N.W.2d 88, 94 CCH Labor Cases ¶13,522 (Neb. 1982). The court first properly determined that it had jurisdiction to hear the matter pursuant to Section 301 of the Labor Management Relations Act, citing *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). In reaching its decision, the court applied federal labor law as prescribed in *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).

In *Jones, supra*, an employee trustee for the "Holiday Trust Fund" approached the multiemployer association to ask whether the association would agree to a dues check-off from the holiday Trust Fund. The association rejected the idea. The trustees then deadlocked over whether to alter the terms of the trust agreement. Thereafter, the employees filed a class action suit seeking a declaration of their right to assign funds from their individual Holiday Trust Fund accounts at commercial Federal Savings & Loan to the Union. 94 CCH Lab. Cases p. 20,918.

The Nebraska Supreme Court relied extensively on this Court's decision in *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562. (1982). After correctly noting that "[o]ne of the primary purposes for the enactment of §186 [§302] was to prohibit the use of employee benefit funds for purposes unrelated to their benefit," the court cited Goetz, "Employee Benefit Trusts Under Section 302 of the Labor Management Relations Act," 59 Nw. U. L.

Rev. 719 at 732:

> The more restrictive aspect of this provision is the requirement that the trust fund be established for the sole and exclusive benefit of certain employees and their dependents. This provision has a twofold effect: (a) it imposes a restriction on the *class of persons* the trust may benefit, and (b) it imposes a restriction on the *nature of the uses* to which the funds may be put. [94 CCH Lab. Cases p. 20,919.]

More importantly, the Nebraska Supreme Court relied on the following language from *UMW Health & Retirement Funds v. Robinson, supra*, interpreting Section 302(c)(5):

> Its plain meaning is simply that employer contributions to employee benefit trust funds *must accrue to the benefit of employees and their families and dependents, to the exclusion of all others*. Indeed, this has been this Court's consistent interpretation of §302(c)(5).
>
> Just last Term, the Court reiterated that "the 'sole purpose' of §302(c)(5) is to ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . . '" *NLRB v. Amax Coal Co.*, ____ *U.S.* ____, ____ (quoting 93 Cong. Rec. 4678 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act, 1947, 1305 (Leg. Hist. LMRA)). See *Arroyo v. United States*, [37 LC ¶65,404] 359 U.S. 419, 425-426. Accord, *Walsh v. Schlecht, 429 U.S. 401, 410-411; Lewis v. Benedict Coal Corp.*, [39 LC ¶66, 240] 361 U.S. 459, 474 (Frankfurter, J., dissenting). This reading is amply supported by the legislative history. See, *e.g.*, 93 Cong. Rec. 4877 (1947), 2 Leg. Hist. LMRA, at 1312 *id.*, at 4882-4883, 2 Leg. Hist. LMRA, at 1321-1322. *The section was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes*, or even to the private benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as "war chests"

to support union programs or political factions, or might become vehicles through which "racketeers" accepted bribes or extorted money from employers.

Our interpretation of the purpose of the "sole and exclusive benefit" requirement is reinforced by the other requirements of §302(c)(5). Section 302(c)(5) is an exception in a criminal statute that broadly prohibits employers from making *direct or indirect payments to unions or union officials*. Each of the specific conditions that must be satisfied to exempt employer contributions to pension funds from the criminal sanction is consistent with the nondiversion purpose. (Emphasis supplied.) 50 U.S.L.W. at 4290. [94 CCH Lab Cases pp. 20,919-20,920.]

Relying on this Court's clear interpretation of Section 302(c)(5), the Nebraska Supreme Court held that the payment of Holiday Trust Fund monies by Commercial Federal directly to the Union pursuant to employee assignments was "neither contemplated by §186 nor permissable under the statute's sole and exclusive benefit requirement." 94 CCH Lab. Cases p. 20,920.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, OPINIONS OF OTHER CIRCUIT COURTS OF APPEAL, AND PRIOR DECISIONS OF THIS COURT

The judgment sought to be reviewed herein concerns the same scheme held illegal by the Nebraska Supreme Court on the *Jones* cases. But in this case, the Ninth Circuit ignored Section 302(c)(5) and (6). Presumably this was no mere oversight, but rather reliance on the cosmetic insertion of Lloyds Bank of California as a conduit for the employer contributions. However, the court in *Jones* placed no significance on the fact that the vacation monies in that case were held in individual accounts at a commercial savings and loan institution. Thus, the Ninth Circuit has condoned payment of monies by an employer to a Trust Fund agent[8] which in turn pays them

8 The Restatement of the Law, Agency 2d, §1, states:

Agency; Principal; Agent

(1) Agency is the fiduciary relation which results from the manifestation of

directly to the Union, in direct derogation of Section 302(c)(5) and(6). To say the bank acts as agent for the employer is tantamount to rendering LMRA §302 a total nullity, since unions could always appoint "straw" or "paper" (bag-men) agents.[9] Thus, the payments remain direct payments from an employer to a union, in violation of Section 302 of the LMRA.

The use of a bank as a fiscal intermediary does not conceal what is a clear violation of LMRA Section 302. In *Nedd v. United Mine Workers of America*, 556 F.2d 190 (3rd Cir. 1972), *cert. denied* 434 U.S. 1013 (1978), the Trust Fund transferred $250,000 of assets to a Union-dominated bank. The Court held this very transfer a Section 302 violation because the bank itself was not a *jointly administered* trust fund. In *Marshall v. Snyder*, 430 F.Supp. 1224 (E.D. N.Y, 1977) *affirmed in part and remanded*, 572 F.2d 894 (2d Cir. 1978), the trust fund caused a trust fund management company to lend money to a union directly. The court found this transaction violated Section 302, and the court therefore re-

---

8 Continued

consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.

Comment b. to subsection 1 of Section 1 above states:

. . . Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that *the principal is to be in control of the undertaking* . . . .

When it is doubtful whether a representative is the agent of one or the other of two contracting parties, the function of the court is to ascertain the factual relation of the parties to each other and in so doing can properly disregard a statement in the agreement that the agent is to be the agent of one rather than of the other, or a statement by the parties as to the legal relations which are thereby created. . . . The agency relation results if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts. (emphasis supplied).

9 A similar form of Trust Fund abuse under the "sole and exclusive" requirements of Section 302 of the NLRA is seen in the case of *Haley v. Palatnik*, 509 F.2d 1038 (2d Cir. 1975). In that case, the Apprenticeship Trust hired the Union business agent to administer a Section §302(c)(6) trust similar to the instant Respondent Vacation and Holiday Trust Fund. The Court of Appeals held that payment of wages to the Union business agent was a sham, and thus, the employer violated Section 302(c)(6), stating that "[t]o hold otherwise would be to render the Act practically useless. Trust Funds would, with employer-union agent connivance, become a means to siphon from the employer payments to the union official who would thus become the recipient of the employer's (or his trustee representative) bounty."

moved the trustees, enjoined the payments and appointed a receiver *pendent lite*. In the instant situation, Lloyds Bank is the agent of either the Union, the Trust Fund or both because the bank has no *independent* interest in the welfare of either the employees or employers; moreover, the Trust Fund owns and controls the account. Respondents selected the bank account solely as a cosmetic cover for the dues check-off scheme. As the Ninth Circuit has stated in *Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1108 (9th Cir. 1976):

> Federal regulation of employee benefit trusts under Section 302(c)(5)(B) was premised on the purpose of insuring that the trust funds were not tampered with or used for illicit purposes. See *Alvares v. Erickson*, 514 F.2d 156, 164 (9th Cir. 1975). In accord with this purpose the Second Circuit, in a well considered opinion, held that "*any payment* made by an employer to an employee representative, and this includes trustees administering a pension trust fund . . and the receipt of such payments by an employee representative are absolutely forbidden unless there is a written agreement between the employer and the Union specifying the basis upon which the payments are made . . . the reason for the rigid structure of Section 302 *is to insure that employer contributions are only for a proper purpose and to insure that the benefits for the established fund reach only the proper parties.*" *Moglia v. Geoghegan*, 403 F.2d 110, 116 (2d Cir. 1968), *cert. den.* 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969). [emphasis supplied.]

See also Local Union No. 626, United Brotherhood of Carpenters and Joiners of America v. Delaware Contractors Ass'n., 344 F.Supp. 1281 (D. Del. 1972), holding that vacation monies submitted in the name of an individual employee by his employer in a bank selected by the Union was illegal since the bank was *a fortiori* an agent of the Union and not a jointly administered trust fund.

The post-January 1981 vacation dues plan is also clearly illegal under this Court's decision in *Arroyo v. United States*, 359 U.S. 419 (1959). In *Arroyo* the Court held that a union

official's embezzlement of trust fund assets did not render *employer* contributions to the fund illegal, if, and only if, "[t]he good faith of the employers in delivering the two checks to the petitioner—their intent that the money go to the welfare fund created by the collective bargaining agreement— was not questioned... " 319 U.S. at 423. Here the intent is clear: Lloyds Bank acts as a conduit to pay the Union money directly from employer contributions to the Vacation and Holiday Trust Fund. The imposition of the bank is a cosmetic sham, and as this Court stated in *Arroyo*, "both [the employer and his representative on the trust fund] would be guilty if the payment were ostensibly made for one of the lawful purposes specified in §302(c) if both [the employer or his representative] knew that such a purpose was merely a sham." 319 U.S. at 424. Here, submission of money to Lloyds Bank is a sham and subterfuge for putting Trust Fund money into the pockets of local Union business agents.

Congress did *not* intend a vacation and holiday trust fund to act as a Union dues collector. LMRA Section 302(a) generally prohibits an employer from making payments to any representatives of his employees. Section 302(c)(6) allows an employer to contribute to an employee benefit trust fund that satisfies certain requirements. "To ensure that the funds in such a trust are not used as a union 'war chest', *Arroyo v. United States*, 359 U.S. 426, 429, the Act provides that it may be used only for specified benefits for employees and their dependents... " *NLRB v. Amax Coal Co.*, 453 U.S. 950, 952, (1981). Paying dues money directly to a Union does *not* provide vacation and holiday benefits, the sole and exclusive purpose mandated by Section 302(c)(6). In addition, the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001 *et seq.*, has further tightened these requirements by codifying common law trust fund fiduciary duties against self-dealing and waste of trust fund assets. In sum, strong statutory prescriptions prohibit Trust Fund payments to the Union; in addition, the Trust Fund lacks any independent reason for acting as a Union dues collection agency.

Perhaps the central question herein concerns why the

trustees of the Vacation and Holiday Trust Fund have allowed the fund to be used as a Union dues collection vehicle. Clearly the Trust Funds' fiduciaries are not allowed to let Union loyalty influence their decision. In *NLRB v. Amax Coal, Co., supra*, this Court stated at length that by enacting Section 302, Congress "intended to impose on trustees traditional fiduciary duties . . . " and "nothing in the language of §302(c)(5) reveals any Congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him . . . " Collecting union dues is an extra burden the trust fund is *not* permitted by statute. In sum, "the duty of the management [or union] appointed trustee of an employee benefit fund under §302(c)(5) is directly antithetical to that of an agent of the appointing party." 453 U.S. at 954.

This Court has emphatically stated that it will not tolerate structural defects in Section 302 trusts. In *United Mine Workers of America Health & Welfare Retirement Funds v. Robinson*, 455 U.S. 562, 109 LRRM 2865 (1982), this Court stated clearly that employer contributions to collectively bargained employee benefit funds must accrue to the benefit of employees and their families and dependents, *to the exclusion of all others*. Thus,

> [Section 302] was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as 'war chests' to support union programs or political factions, or might become vehicles through which 'racketeers' accepted bribes or extorted money from employers.
>
> Our interpretation of the purpose of the "sole and exclusive benefit" requirement is reinforced by the other requirements of §302(c)(5). Section 302(c)(5) is an exception in a criminal statute that broadly prohibits employers from making direct or indirect payments to unions or union officials. Each of the specific conditions to pension funds from the criminal sanction is consistent

with the nondiversion purpose. The fund must be established "for the sole and exlusive benefit" of employees and their families and dependents; contributions must be held in trust for that purpose and must be used exclusively for health, retirement, death, disability, or unemployment benefits; the basis for paying benefits must be specified in a written agreement; and the fund must be jointly administered by representatives of management and labor.[10] All the conditions in the section fortify the basic requirement that employer contributions be administered for the sole and exclusive benefit of employees.[11]

Robinson, supra, 109 LRRM at 2868-2869.

Finally, it is a clear violation of Section 302 to use Trust Fund counsel and auditors, to institute Trust Fund lawsuits, or to utilize other Trust Fund assets to force the employer to pay Union dues. There is no exception in Section 302 for a hybrid trust that provides $5 million annually to the Union for its own

10 *Robinson* involved a Section 302(c)(5) Trust Fund. Respondent Vacation and Holiday Benefit Trust Fund is a 302(c)(6) Trust Fund, and by statute can only exist for the sole and exclusive purpose of providing pooled vacation and holiday pay, severance or similar benefits, or apprenticeship or other training, although the trust document itself limits the fund to pooled vacation and holiday pay.

11 The Congressional purpose of Section 302 was reported in *Robinsn* at footnotes 9 and 10, as follows:

> [9] Senator Taft, the primary author of the LMRA, stated:
>
> Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union, and that the employees for whose benefit it is supposed to be established, for certain definite welfare purposes, will have no legal rights and will not receive the kind of benefits to which they are entitled after such deductions from their wages.
>
> [10] Senator Ball, one of the sponsors of the floor amendment that became §302, stated:
>
> All that is sought to be done by the amendment is to protect the rights of employees. After all, on any reasonable basis, payments by an employer to such a fund are in effect compensation to his employees. All that is sought to be done in the amendment is to see to it that the rights of employees in the fund are protected.
>
> • • •
>
> In other words, when the union has complete control of this fund, when there is no detailed provision in the agreement creating the fund respecting the benefits which are to go to employees, the union and its leadership will always come first in the administration of the fund, and the benefits to which the employees supposedly are entitled will come second. [109 LRRM at 2868.]

general purposes."

Other variatons of the"Supplemental Dues" plan herein have been held illegal by other Courts of Appeal. In the case of *International Longshoremen's Association v. Seatrain Lines*, 326 F.2d 916, 920 (2d Cir. 1964), the Court specifically held unlawful a contract requiring payment of a percentage of trust fund contributions into the general fund of the union. The Court noted that

> [t]he present controversy involves precisely the kind of payment which Section 302 was designed to prohibit . . . Obviously, no exception from the inhibitions of Section 302 was intended to permit such payments where the union's claim to them is based on a collective bargaining agreement or other contract.[12]

Another critical point must be considered. Under both the old and the revised Vacation Fund dues check-off plans, the dues check-off authorization card signed by an employee is used in *any subsequent employment* and therefore extends this relationship to limitless employers, many of whom are not members of any multiemployer association. This procedure effectively nullifies the employee's statutory ability to defer or cease union dues check-off upon changing employers. The check-off authorization's automatic yearly renewal provisions and its hyper-technical notice and window period provisions operate to lock in the innocent employee to a dues check-off scheme *ad infinitum*, contrary to the true intent of Section 302(c)(4). *See Felter v. Southern Pacific Co.*, 395 U.S. 326 (1959).

Respondents have tacitly admitted the illegality of the dues check-off provisions of the Carpenters Vacation and Holiday Trust Fund, but plead an inability to conform to Section 302 requirements. Such an inability should not be excused; preventing Union domination of jointly administered Trust Funds

---

12 The Ninth Circuit has also concluded that payments to the trust fund or to any other agent of the union are strictly illegal unless within the exact letter of the sole and exclusive purpose provisions of Section 302(c). See *Thurber v. Western Conference of Teamsters Pension Plan, supra*. The Court of Appeals for the Ninth Circuit offers no explanation for its digression from past precedent in this case.

and the use of such Trust Funds as a device for building union war chests, requires strict interpretation of Section 302.

CERTIORARI SHOULD BE GRANTED TO SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (29 U.S.C. §§1001 et seq.)

The Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* (ERISA) requires that the assets of a plan such as Respondent Trust Fund are to be held for the exclusive purpose of providing benefits to participants in the plan. 29 U.S.C. 1103(c)(1) provides in material part:

> Except as provided... the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of adminstering the plan.

Section 1104(a)(1) of Title 29 of the United States Code established the *fundamental standard* to which all fiduciaries of employee benefit plans are subject. 29 U.S.C. §1104(a)(1) provides:

> ... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
>
> (a) for the *exclusive purpose* of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan; (emphasis added).

Section 1106 of Title 29 (*Prohibited Transactions*) provides in relevant part:

> (a) Except as provided in Section 1108 of this Title:
>
> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction consititutes a direct or indirect

• • •

> (B) *lending of money* or other extension of credit *between the plan and a party in interest*;
>
> • • •
>
> (D) *transfer to or use by or for the benefit of, a party in interest, of any assets of the plan . . .* " [emphasis added].

ERISA defines "party in interest" to include "an employee organization any of whose members are covered by such plan." 29 U.S.C. Section 1002(14) (ERISA §3(14)).

ERISA, 29 U.S.C. Section 1109 provides for liability for breach of fiduciary duty. This section of ERISA also provides for equitable and/or injunctive relief. Under ERISA, Petitioners have standing to redress this structural defect because they have suffered injury, in fact, due to (1) being required by Court order to contribute to an unlawful fund, (which is tantamount to commission to a criminal act with resulting criminal liability under Section 302(d) of the NLRA), and (2) the economic loss sustained by the employers for the lost interest and decreased vacation pay with respect to future Union demands at the bargaining table. Therefore, Petitioners seek the return of these monies from the Union and Trust Fund for distribution to employees. As previously stated, these monies, termed "vacation benefits," are used by employees in the seasonal construction industry, to supplement their normal unemployment benefits. Thus, the employers, as settlors of this Vacation Trust Fund, and as those ultimately responsible for the welfare of their employees, are within the zone of interest protected by ERISA, and are *not* prohibited by statute from suing under ERISA. Accordingly, the employers as Petitioners herein, clearly have standing to sue under ERISA. *See Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982) which states:

> Fentron's alleged injuries also fall within the zone of interests that Congress intended to protect when it enacted ERISA. Section 2(a) of ERISA, 29 U.S.C. §1001(q), recognizes that pension plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," and

> that therefore it was desirable to enact ERISA. The threat to Fentron's relationship with the Union, and to the continued employment by Fentron of its employees, falls within this range of concerns.

The United States District Court for the Western District of Michigan decided a case on all fours with the instant action. In *Marshall v. Davis*, 517 F.Supp. 551 (W.D. Mich. 1981), the Secretary of Labor brought an action under ERISA claiming that the trustees of the Michigan Carpenters' District Council Vacation and Holiday Fund, in cooperation with the Carpenters' Union, had violated ERISA by "deducting union dues from monies in the Plan on a monthly basis while disbursing funds to the Plan's participants on an annual basis." The Secretary of Labor claimed that the trustees violated their fiduciary duty to the plan's participants since they did not operate the plan "*solely* and *exclusively* for the benefit of participants as required by ERISA Section 403(c)(1), 29 U.S.C. §1103(c)(1)." The Court summarized the Secretary of Labor's argument as follows:

> As the sole stated purpose of the Plan is to provide payments for vacations and holidays and as participants in the Plan are unable to withdraw these funds until the annual disbursement or to assign them for the benefit of creditors until the funds are released, Plaintiff contends that these arrangements to permit the Union to gain dues in this manner are in contravention of specific provisions of ERISA as well as the interests of the Plan participants and beneficiaries in favor of those of the Union.
>
> Money that is set aside for union dues is not invested while assets disbursed on an annual basis are invested in short-term securities which are timed to mature annually when the funds are to be returned to the participants. If the Plan makes profitable investments, dividends are declared (less costs of administering the Plan) which are included in the annual payments to participants. If costs exceed the return on investment, they are assessed to the participants. 517 F.Supp. at 551.

This is precisely the situation presented in the instant action. As provided in the Carpenters Vacation and Holiday Trust Fund trust agreement (Exhibit C to Petitioners' First Amended Complaint):

> The distribution of benefits for each vacation year shall be made by checks mailed to Employees in a single mailing . . . immediately preceeding the vacation year." (Article V, "Vacation and Holiday Benefits" §2).

However, Section 43-A, of the Carpenters Master Agreement herein, "Work Fee" ("Supplemental Dues"), *supra*, provides for a monthly distribution of a portion of the fund's assets to the Union. Thus, the contributions from the employers to the Trust Fund which Respondent Trustees distribute to the Union each month are not being invested or otherwise used for the sole and exclusive benefit of the employee beneficiaries of the Trust Fund as required by ERISA Section 403(c)(1).

In *Marshall v. Davis*, *supra*, the Court cited ERISA Sections 403(c)(1), 404(a) and 406 and concluded that the Secretary of Labor properly founded his suit on ERISA which does not permit transactions such as those here at issue.

The Court declared:

> The legislative history of ERISA makes it clear that, as the House report on HR2 indicates, *"The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants." Marshall v. Snyder*, *supra*, at 901.

It is my opinion that there is a *per se* adverse transaction involved when the Defendant-Trustees attempt to "balance the interests" involved by facilitating a Union dues assessment program and by managing in a financially responsible way the Vacation and Holiday Trust Fund for the benefit of participants. The Third Circuit Court of Appeals addressed the dangers inherent in trying to balance divergent interests in administering two

union funds when there was an obvious overlap in the identity of the participants, the union locals, and the employers who were parties to the plans when both had the same trustees.

Cutaiar v. Marshall, 590 F.2d 523 (CA 3 1979) stated:

'We note the national public interest in safeguarding anticipated employee benefits by establishing *minimum* standards to protect employee benefit plans. The substantial growth of plans affecting the security of millions of employees and their dependents, as well as the limited resources of the Department of Labor in the enforcement of ERISA, leads us to believe that Congress intended to create an easily applied per se prohibition of the type of transaction in question... We do not regard this as a harsh rule.' I find that the Plan must be represented by trustees who are free to exert the maximum economic power manifested by their fund whenever they are negotiating a commercial transaction and that Section 406(b)(2) speaks of the interests of the Plan or beneficiaries not "some" or "many" or "most" of the participants. While the trustees may have operated with the best of intentions to accommodate all the parties involved, provision for the monthly distribution of Plan assets to the Union dilutes the economic viability of the Holiday and Vacation Fund. Until the funds are available to the participants, the trustees may not disburse Plan assets to a party in interest. [517 F.Supp. at 552-553.]

The individual trustees named in the Compaint have jointly and/or separately violated their fiduciary duty in acquiescing in and/or failing to prevent the illegal payments of Trust assets from respondent Trust Fund to Respondent Union. Each is liable for breach of the fiduciary duty pursuant to 29 U.S.C. §1109 (liability for breach of fiduciary duty), and each is, by virtue of that section, subject to removal by the Court:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this subchapter *shall be personally liable to make good to such plan any losses to*

> *the plan resulting from each such breach*, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, *and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.* A fiduciary may also be removed for a violation of Section 1111 of this title. (emphasis added).

It is submitted that there has been a past and continuing breach of the fiduciary duty by the individual Trustees. The purpose of Congress in enacting 29 U.S.C. §1104, *supra*, mandates that the Courts interpret the "solely" and "exclusive purpose" provisions strictly, and that such fiduciary duties be interpreted so that employees with years of employment would receive *all anticipated benefits. See Winpisinger v. Aurora Corp. of Illinois*, 456 F.Supp. 559 (N.D. Ohio 1978). In *Morgan v. Laborers Pension Trust Fund for Northern California*, 433 F.Supp. 518 (N.D. Cal. 1977), the Court recognized that all trustess of employee funds have the duty to take those actions believed to be in the best interest of the fund's beneficiaries and no other persons or parties. Why then have the trustees permitted the Trust Fund to be used for such a non-trust purpose as collecting union dues? As the House report on ERISA indicates:

> The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants." (H. Rep. No. 533, 93d Cong., 2d Sess., reprinted in [1974] 3 U.S. Code, Cong. & Admin. News, pp. 4639, 4655).

Senate Report No. 93-127 repeated the language of the House Report, in reporting on S.4, 93d Cong. 3d Sess., reprinted in [1974] 3 U.S. Code Cong. & Admin. News, pp. 4639, 4871. Senate Report No. 93-383, reporting on S. 1179, in discussing the broad range of remedies proposed in the Senate Bill said (*id.* 4989):

> Also, the bill specifically provides that a fiduciary may be

removed through civil action brought by the Secretary or participants or beneficiaries if he has violated any of the specified fiduciary obligations, or is serving in violation of the criminal conviction provisions. (The Attorney General also may bring an action to remove in the latter case.) It is expected that a fiduciary (other than one serving in violation of the criminal conviction provisions) may be removed for repeated or substantial violation of his responsibilities, and that upon removal the court may, in its discretion, appoint someone to serve until a fiduciary is properly chosen in accordance with the plan.

The case of *Marshall v. Synder*, 430 F.Supp. 1224 (E.D. N.Y. 1977), *affirmed in part and remanded*, 572 F.2d 894 (2d Cir. 1978), is also analogous to the case at bar. In that case, the Secretary of Labor charged a Teamster Welfare and Annuity Benefit plan with many abuses of ERISA, the most significant being that the Welfare Funds bought a trust fund administration management company, and then caused it to loan money to the Union directly, and caused it to give money to union field representatives in the form of repayment for "benefit administration" when the primary purpose of each field representative was to get the Union new members. In *Marshall v. Synder*, the Court granted the requested injunctive relief and entered an order for appointment of a receiver as follows:

> . . . Judge Pratt granted the Secretary's motion to the extent of enjoining all defendants *pendente lite* from making or permitting to be made any payments by RPI or any of the employee benefit plans to defendants Calagna, Isola, William Synder or Clarke, and appointed a receiver of the Welfare, Pension and Annuity Funds and of RPI pending final determination of the action. A detailed receivership order was entered later which vested the receiver with legal title to and exclusive possession and control of all of the assets and property of the three plans. The receiver was specifically empowered, in ultimate substance, to conduct the affairs of the employee benefit plans and of RPI; the defendants and their agents were enjoined from dealing in any way of the employee benefit plans or of RPI, and were enjoined from interfering with

> the receiver's administration in any way. The receiver was directed to undertake a review of the manner of administering the plans and RPI in order to determine generally what changes if any in administration were necessary to the lawful and orderly operation of the plan . . . and to report to the Court any proposed changes as well as a proposal for the future administration of the plans and of RPI." *Id.*, 572 F.2d at 897 (1978).

As contributors to the fund, Plaintiffs have standing to raise the ERISA claim because this ERISA violation is also a structural defect under Section 302 of the NLRA. The case of *Marshall v. Snyder* demonstrates that the "sole and exclusive" purposes language of Section 302(c)(6) of the NLRA is to be complemented and further narrowed by the requirement that trust assets be used "solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of providing benefits to participants and their beneficiaries . . . " 29 U.S.C. §1104(a)(1). In *Marshall v. Snyder*, the district court recognized that paying money to a union or union official is *not* in the sole interest of the plan participants, is not using trust fund assets "exclusively to provide benefits" to the beneficiaries and creates an

> . . . inherent conflict of interest and potential for self-dealing which result from the union officers' controlling both the Plans and RPI, which is the administrative agent of the Plans . . .
>
> • • •
>
> . . . and when interpreted in the light of the serious charges of misappropriation of trust fund monies alleged in the complaint, require *immediate* and drastic action by the court in order to preserve from further dissipation the assets of the Plans for the benefit of their participants and beneficiaries . . .
>
> • • •
>
> This dissipation of plan assets must stop if the legitimate rights and expectations of the Plans' participants and their beneficiaries are to be protected . . . For the present purposes, the trustees for each of the three plans need only to be suspended from their functions and ac-

tivities as trustees pending final determination of the action. *Marshall v. Snyder, supra*, 430 F.Supp. at 1232–1233.

The foregoing argument clearly shows that trustees may not transfer any assets of the Respondent Trust Fund to a party in interest for that party's use or benefit. ERISA Section 406, 29 U.S.C. §1106(a)(a)(D); *Marshall v. Davis, supra*. To prohibit multi employer vacation plans from collecting and transmitting Union dues before the money is payable to fund beneficiaries is to uphold the intent of Congress to provide security for welfare benefit plans by creating a broad remedial statute to be liberally construed. *Marshall v. Davis*, 517 F.Supp. at 554. There can be no doubt that the check-off system is designed to assist Respondent Union, a party in interest, in the collection of Union dues. By these same transactions the Respondent Trust Fund incurs an economic loss since the diverted funds are not available for investment. Therefore, Petitioners urge that this Court remand this case for decision in light of *Marshall v. Davis*, where the Court enjoined the trustees from further disbursing fund assets prior to their availability to fund participants.

Attorneys' Fees

Respondents argue that attorneys fees are not allowable under Section 502(g) of ERISA, 29 U.S.C. §§1132(g), because they assert that Appellants do not have standing to sue under that section. Petitioners' injuries clearly fall within the "zone of interests" protected by ERISA under the test of *Data Processing Service Organization v. Camp*, 397 U.S. 150 (1970). As set forth in *Data Processing, supra*, and adopted as a test in *Fentron Industries, Inc. v. National Shopmen Pension Fund, supra*, in order to have standing to sue for violations of a federal statute, a plaintiff must (1) suffer an injury in fact; (2) fall arguably within the zone of interest protected by the statute allegedly violated; and (3) show that the statute itself does not preclude the suit. Clearly, Petitioners meet the requirements of this test and attorneys' fees are therefore allowable under Section 502(g) of ERISA.

In addition, attorneys' fees are recoverable in a Section 302

action under the authority of *Burroughs v. Board of Trustees of the Pension Trust Funds for Operating Engineers*, 542 F.2d 1128 (9th Cir. 1976). As in *Burroughs*, Petitioners herein brought this action contesting the structural validity of a Section 302 Trust Fund, and seek the return of diverted money to the properly intended beneficiaries. By seeking a declaration that the Trust Fund was structurally invalid, and that the Union should be disgourged of its illegal "skim" money taken from the top of the Vacation Trust, Petitioners herein seek a common good, the return of money from the Union to the Trust Fund. Even if the substitution of a fiscal intermediary has cured the structural defect, which Petitioners contend it does not, then Petitioners have performed a service to the Trust Fund and are therefore entitled to attorneys' fees. *See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall v. Cole*, 412 U.S. 1 (1973).

CONCLUSION

Wherefore, Petitioners respectfully pray that a writ of certiorari issue from this Court to review the judgment of Ninth Circuit Court of Appeals. In the event that the petition is granted, Petitioners pray that the judgment of the Ninth Circuit be reversed, that the cause be remanded to the United States District Court for the Northern District of California and that the District Court be directed to issue preliminary injunction, appoint a receiver to oversee the operation and restructuring of Respondent Trust Fund, order all "supplemental dues" monies returned to Respondent Trust Fund by Respondent Union, and order that Petitioners recover all costs including attorneys' fees.

THIERMAN, SIMPSON & COOK
Mark R. Thierman
50 California Street, Suite 2840
San Francisco, California 94111
Telephone: (415) 434-4672
(916) 442-3100
Counsel for Petitioners

No.

In The Supreme Court of the United States

OCTOBER TERM, 1983

ASSOCIATED BUILDERS & CONTRACTORS, Northern California and Golden Gate Chapters, individually and on behalf of their members; OPINSKI CONSTRUCTION; THORNHILL CONSTRUCTION COMPANY; FRANK TORRES CONSTRUCTION COMPANY; WHITAKER CONSTRUCTION, INC.; GREAT WESTERN CONSTRUCTION, INC.; DRW CONSTRUCTION; WILLARD ENTERPRISES, INC.; on behalf of themselves and all others similarly situated,

Petitioners,

vs.

CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA and GORDON W. HANSON; RICHARD CLARK; CHARLIE PETERSON; JAMES WHITTAKER; HOYLE HASKINS; L.E. BEE; RUSSELL POOL, individually and as trustees for said Carpenters Vacation and Holiday Trust Fund; CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) on behalf of itself and its member unions,

Respondents.

APPENDIX

THIERMAN, SIMPSON & COOK
Mark R. Thierman
50 California Street, Suite 2840
San Francisco, California 94111
Telephone: (415) 434-4672
(916) 442-3100

United States Court of Appeals
For the Ninth Circuit

ASSOCIATED BUILDERS & CONTRACTORS et al.,
Plaintiffs-Appellants

v.

CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA et. al.,
Defendants-Appellees.

Nos. 81-4122, 82-4359, 81-4687

D.C. No. C-80-2918-SW

OPINION

Appeal from the United States District Court for the District of Northern California The Honorable Spencer Williams, Presiding.

Argued and Submitted September 14, 1982

Filed March 10, 1983

Before: DUNIWAY, FLETCHER, AND BOOCHEVER, Circuit Judges.

FLETCHER, Circuit Judge:

This is an appeal from a summary judgment for defendants in an action challenging a dues check-off provision in a collective bargaining agreement between the United Brotherhood of Carpenters and Joiners (the Union) and various employers engaged in the construction industry. The plaintiffs, an employer organization known as Associated Builders & Contractors (ABC) and several ABC members, brought the action on behalf of all member employers who transfer dues to the Union pursuant to the check-off provision. They contend that the dues check-off procedure violates the provisions of the Labor management Relations Act (LMRA) and the Employment Retirement Income Security Act (ERISA). We have jurisdiction under 28 U.S.C. 1291 (1976) and affirm.

I
FACTS

ABC brought this action on July 14, 1980. At that time, the 46 Northern California Counties Carpenters Agreement (the 1978 Master Agreement) required employers to contribute vacation and holiday benefits to the Carpenters Vacation and Holiday Trust Fund of Northern California (Trust Fund), that funded an employee welfare benefit plan established by the parties to the 1978 Master Agreement. The amounts contributed for each employee were calculated according to the numbers of hours worked. By the terms of the 1978 Master Agreement, the contributions were deemed additional compensation.

The 1978 Master Agreement included a union security clause that required employees to be Union members in good standing in order to retain their jobs. For each hour worked, an employee was assessed supplemental union dues of ten cents. The agreement allowed an employee to authorize the trustees to deduct assessed supplemental dues from the employee's vacation and holiday benefits account. For each employee who signed a card authorizing the deduction, the trustees of the Trust Fund remitted to the Union a monthly payment of supplemental dues. The trustees distributed the remaining funds in the vacation and holiday account of each employee to the employee on an annual basis.[1]

Contending that the payment of union dues out of the Trust Fund violated section 302 of the LMRA and sections 403, 404, and 406 of the ERISA, ABC sued the Trust Fund, the Fund's trustee, and the Union. ABC sought to have the Union return to the employers or, alternatively, to the Trust Fund all supplemental dues tansferred under the check-off procedure of the 1978 Master Agreement. ABC also sought a preliminary injunction restraining the trustees from paying any further monies to the Union under the check-off procedure. The district court denied the motion for preliminary relief and ABC's motion for reconsideration.

In 1980, the parties to the 1978 Master Agreement agreed to a modified collective bargaining agreement (the 1981 Master Agreement) in an attempt to remedy the alleged defects.[2] Under the 1981 Master Agreement, supplemental dues are

assessed against each employee at the rate of twenty-five cents per hour worked. Every month, each employer sends a check in an amount equal to the total supplemental dues assessed against all employees working for that employer during that month to the employer's designated agent, Lloyds Bank of California (Lloyds). For each employee's paycheck, the amount remitted to Lloyds as supplemental dues for that employee is deducted from total taxable wages. Lloyds deposits the monies remitted by the employer as supplemental dues in a special account. Once a month, the bank transfers the monies from the account in part to the Union (for payment of supplemental dues), and in part to the Trust Fund (for payment of additional vacation and holiday benefits), based on an allocation between monies designated as supplemental dues by employees and monies as to which there is no outstanding check-off authorization.[3]

After the 1981 Master Agreement was signed, the district court granted summary judgment to the defendants on the ground that the modification has mooted ABC's claims of invalidity of the check-off procedure under the 1978 Master Agreement. ABC appeals both from this judgment and from the earlier orders denying ABC's motions for preliminary relief. ABC contends that the modification did not cure the alleged violations of section 302 of the LMRA and the ERISA provisions.

The district court's denial of preliminary relief and refusal to reconsider that denial have merged into the final order disposing of the action. *See SEC v. Mt. Vernon Memorial Park*, 664 F.2d 1358, 1361-62 (9th Cir.), *cert. denied*, 102 S. Ct. 2037 (1982). We therefore dismiss ABC's two interlocutory appeals (Nos. 81-4122 and 81-4359) and consider only the appeal from the final judgment (No. 81-4687).

II.
SECTION 302

Section 302 of the LMRA, 29 U.S.C. § 186 (1976), prohibits an employer from paying any monies to a union and fortifies that prohibition with criminal sanctions. Section 302(c)(4) of the Act establishes one of several exceptions to that prohibition for payments from employer to union that constitute

money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

29 U.S.C. §186(c)(4) (Supp. II 1978). Thus, the LMRA permits an employer to transfer money to a union if: (1) the money is in payment of membership dues; (2) the employer has received a valid written authorization from the employee; *and* (3) the money is deducted from wages.

ABC contends that, under the terms of the 1981 Master Agreement, transfers of "supplemental dues" monies by Lloyds to the Union in effect constitute payments by the employers to the Union in violation of section 302 since the payments to the Union originate in funds transferred by the employer to Lloyds and since the requirements set forth in section 302(c)(4) are not met. ABC urges us to overturn the summary judgment granted below and to grant declaratory and injunctive relief forbidding further transfers from Lloyds to the Union. We reject the argument and uphold the dues check-off procedure under the 1981 Master Ageement.[5]

A. *Membership Dues.*

ABC argues first that the monies transferrred to the Union as "supplemental dues" are not in payment of "membership dues" because the Union uses part of the revenues from such supplemental dues for "political" purposes, that is, to hire organizers to combat the "open shop" movement in the California construction industry and to discourage employers from going non-union. ABC contends that since "membership dues" cannot be expended for political purposes, the money deducted here is not "in payment of membership dues" and thus Lloyds is prohibited by section 302(c)(4) from transferring such monies to the Union. We disagree.

Where federal or state law authorizes a union security agreement (an agreement that conditions an employees continued employment on the payment of union dues), the first and fourteenth amendments prohibit a union from expending an employee's membership dues for political causes, over the

employee's objection. *Abood v.Detroit Board of Education*, 431 U.S. 209, 235-36 (1977) (Michigan labor law); *Ellis v. Brotherhood of Railway clerks*, 685 F.2d 1065, 1067 (9th Cir. 1982) (Railway Labor Act); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1003 (9th Cir. 1970)(LMRA).

A union's expenditure of dues revenue for political goals is not proscribed by the first amendment, however, unless the employee from whom the dues are exacted affirmatively objects to the expenditure. *See Abood*, 431 U.S. at 236, 241. Here, there is no suggestion that any employee objects to the use of his supplemental dues to hire union organizers.

Furthermore, an expenditure is considered "political" for purposes of first amendment analysis only if it is not germane to the union's work in the realm of collective bargaining. *Ellis*, 685 F.2d at 1072-73. Money spent on organzing to eliminate competition from non-union employers is germane to collective bargaining and therefore is not a "political" expenditure for purposes of first amendment analysis. *Id.* at 1074.

For these reasons, we reject ABC's contention that the monies collected here and transferred to the Union are outside the scope of compulsory "membership dues" permitted by the first amendment. Thus, even assuming that a union's violation of the first amendment proscriptions would transform payments by the employer into something other than membership dues, no such violation has been shown here.[6]

B. *Valid Written Authorization.*

Section 302(c)(4) allows dues check-offs only if "the employer has *received* from each employee, on whose account such deductions are made, a [valid] written assignment." 29 U.S.C. § 186(c)(4)(emphasis added). ABC contends that the check-off provision of the 1981 Master Agreement is invalid because the individual employers do not receive the dues check-off authorization cards. Instead, each employer appoints a common intermediary (Lloyds) as its agent to receive the authorization cards from its employees and to deduct monies pursuant to such authorizations on behalf of the employer.

Nothing in the language of the Act proscribes an employer's appointing an agent for this purpose. Indeed, the statutory definition of "employer" includes "any person acting as an

agent of an employer, directly or indirectly." 29 U.S.C. § 152(2)(1976).

Moreover, the purpose of requiring an employer to receive authorization is to prohibit the deductions of dues without an employee's consent. *See* 93 Cong. Rec. 4876 (1947)(statement of Sen. Taft), *reprinted in* 2 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 1311 (1948). In construing the dues check-off provision of section 2, Eleventh (b) of the Railway Labor Act, which is very similar to section 302(c)(4) in both language[7] and legislative intent, *see Felter v. Southern Pacific Co.*, 359 U.S. 326, 332 n.10 (1959), the Supreme Court stated that employers and unions have considerable latitude to set up procedures for processing individual authorizations and revocations of check-offs, as long as the procedures do not infringe upon the employee's freedom to revoke the check-off. *Id.* at 333-35. The Court noted that employers may make reasonable designations of agents to whom revocations may be sent. *Id.* at 335 (dictum).

In this case, the provision in the 1981 Master Agreement permitting an employer to designate a bank as its agent to receive authorizations and revocations is a reasonable adaptation of the requirements of section 302(c)(4) to the transitory nature of employment in the construction industry. A contractual requirement that each employee must send authorizations and revocations directly to each of the employee's employers would be impractical because an employee ordinarily works for several different employers during the course of a year.

Contrary to ABC's assertion, the procedures under the 1981 Master Agreement do not restrict an employee's right to revoke a check-off authorization. ABC asserts that a single card used for all employers effectively denies an employee the right to revoke the check-off at the time he changes employers. Section 302(c)(4), however, does not require that an employee be free to revoke the check-off whenever he changes employers. Rather, section 302(c)(4) requires only that, for any dues deducted from an employee's wages pursuant to that provision, the employer paying those wages must have received an authorization from the employee that is not irrevocable for longer than a year, regardless of how many employers the authorization covers. Since each authorization

signed by an employee in this case expressly authorizes "all individual employers" who were parties to the 1981 Master Agreement to deduct supplemental dues, the check-off provision in the 1981 Master Agreement satisfies this requirement.

C. *Deduction from Wages.*

ABC contends finally that the transfer of "supplemental dues" monies from Lloyds to the Union violates section 302(c)(4) of the Act since those payments are deducted not from "wages" but from a commingled fund of dues and fringe benefits held by Lloyds. ABC argues that since some of those monies transferred from the employers to Lloyds are in turn transferred to the Trust fund and used for the purpose of vacation and holiday benefits pursuant to section 302(c)(6) of the Act,[8] the supplemental dues are in effect commingled with Trust Fund monies and thus are not money deducted from "wages" as required by section 3.2(c)(4). We disagree.

Under the terms of the 1981 Master Agreement, all monies remitted to Lloyds that are designated as "supplemental dues" are deducted by the employer from the appropriate employee's "wages" and appear as deductions on the employee's paychecks and tax statements, whether or not Lloyds eventually transfers those "wages" deductions to the Trust Fund or to the Union.[9] Hence, those monies sent to Lloyds are clearly money deducted from wages as required by section 302(c)(4).

Contrary to ABC's contentions, the procedures of the 1981 Master Agreement safeguard against an employer's transferring to the Union any monies as to which there is not a valid dues check-off. Payments to the Union are made by Lloyds from the account designated "supplemental dues" at such time as a precise allocation between dues and vacation and holiday benefit monies has been made and at the same time as the funds due the Trust Fund are disbursed to it.[10] The Union does not have access to the Trust Fund monies; it merely receives supplemental dues from Lloyds that would otherwise be due directly from the employees.[11]

The dues checkoff procedure of section 302(c)(4) is designed to ensure not only the "protection of the employee" but also administrative convenience in the collection of dues. *NLRB v. Atlanta Printing Specialties and Paper Products Union 527*, 523 F.2d 783, 786 (5th Cir. 1975); *Anheuser-*

Busch, Inc. v. International Brotherhood of Teamsters, Local 822, 584 F.2d 41, 43 (4th Cir. 1978). Given the transitory nature of employment in the construction industry, we conclude that the Union cannot be expected to provide individual authorization cards to each employer with whom an employee might work; conversely, an employer simply cannot reasonably be required to make separate deductions for dues and fringe benefits from an employee's "wages," to do the bookkeeping for such allocations, and to submit separate checks for each. To prohibit the employers in this case from designating an agent to allocate dues and fringe benefits from employee "wages" deductions would frustrate the legislative purpose of section 302(c)(4), since no other practical manner exists to ensure the remittance to the Union of those dues that employees have voluntarily and affirmatively authorized the employer to deduct.

III
ERISA

ABC contends that the trustees of the Trust Fund, by allowing the bank to disburse monies to the Union that are allegedly assets of the Trust Fund,[12] have failed to operate the plan solely and exclusively for the benefit of the plan's participants as required by sections 403, 404, and 406 of the ERISA, 29 U.S.C. §§ 1103, 1104, 1106 (1976). The trustees counter that ABC lacks standing to sue under the ERISA.

Although the ERISA does not prohibit employers from suing to enforce its provisions, an employer must allege, *inter alia*, "specific and personal" injuries from violations of the ERISA in order to have standing to enforce the statute. *Fentron Industries, Inc v. National Shopmen Pension Fund*, 674 F.2d 1300, 1304 (9th Cir. 1982). The trustees of the trust fund in *Fentron* refused to pay earned pension benefits to Fentron employees unless they quit Fentron and worked at least a year for another contributing employer. The fund's action threatened direct injury to Fentron. The Trust Fund's action in this case poses no comparable threat to ABC or its member employers. Furthermore, whereas the trustees in *Fentron* unilaterally modified the criteria for disbursements from the fund in order to penalize Fentron for failing to renew a

collective bargaining relationship, the ABC employers themselves bargained over and agreed to the Trust Fund arrangement, including the check-off provision.

ABC contends that the payment of union dues out of Trust Fund money decreases the vacation pay that some employees would otherwise receive and that this decrease in benefits will cause the employees to demand more fringe benefits when the next collective bargaining agreement is negotiated. All collective bargaining, however, involves compromise. In return for accepting a check-off provision that might lead to pressure from employees for increased fringe benefits, the employers in this case presumably gained something of value at the bargaining table. *See Connecticut State Federation of Teachers v. Board of Education*, 538 F.2d 471, 482 (2d Cir. 1976) (citing cases). Employee demands arising from these "give-and-take" negotiations, which are characteristic of any collective bargaining relationship, are not a cognizable "injury" to the ABC employers. The employers allege as their injury putative employees dissatisfaction arising from the performance under the agreement that was bargained for. This is simply not the personal and specific injury to the employers that imparts standing under the ERISA.

IV
CONCLUSION

In Nos. 81-4122 and 81-4359, the appeals are dismissed. In No. 81-4687, we affirm the summary judgment against ABC and its members.

FOOTNOTES

1 *Section 43-A of the 1978 Master Agreement provided:*

> Effective for all work performed on and after January 1, 1978, it is agreed that upon written authorization, provided by the Union, as required by law, the amount of ten cents (10¢) per hour, for each hour paid for or worked, shall be deducted from the Vacation and Holiday benefit of each workman and remitted directly to the Union, or the appropriate Local Union or District Council of the Union, as the Union may from time to time direct. The amount of the deduction shall be specified on a statement transmitted to the workmen. Such remittance shall be made to the Union not less than twelve (12) times per year.

Section 11 of Article V of the Trust Agreement adopted by the parties to the 1978 Master Agreement provided:

> Notwithstanding any other provision of this Trust Agreement to the contrary, the Board of Trustees is authorized, and is hereby expressly directed by the parties hereto, to deduct the amount specified in Section 43-A of the Carpenters 46 Northern Counties Master Agreements . . . from the undisbursed vaction and holiday benefits of each employee who executes a voluntary dues authorization therefore as required by law, for all hours paid for or worked by such employee on and after January 1, 1978, under any of such agreements, and to remit said amount directly to the Union, or to the appropriate District Council or Local Union as the Union may direct, not less than 12 times per year commencing on and after June 1, 1978, as supplemental membership dues of such employee. The Union shall provide the Board of Trustees with a receipt for each such remittance signed by its Executive Officer, and the Fund shall send each employee from whose benefits a deduction has been made a quarterly statement specifying the amount of such deduction. The Union shall exonerate, reimburse and save harmless the Fund, the Board of Trustees and the Trustees, individually and collectively, against any and all liabilities and reasonable expenses arising out of any such deduction or remittance.

The voluntary dues authorization under the 1978 Master Agreement was in the following form:

AUTHORIZATION FOR CHECK-OFF

I hereby authorize the Carpenters Vaction-Holiday Trust Fund for Northern California to deduct the amount specified in Section 43-A of the Carpenters Master Agreement . . . from my undisbursed Vacation-Holiday benefit for all hours paid for or worked by me on or after January 1, 1978, and remit said amount directly to the Carpenters 46 Northern California Counties Conference Board or to the appropriate District Council or Local Union as said Conference Board may direct as supplemental work dues. This authorization may be revoked by me, in writing to the Trust Fund, within the 30 day period prior to the expiration of said Master Agreement . . . or one year from the date hereof whichever is sooner. If not revoked, this authorization shall be deemed as renewed from year to year thereafter.

Signature_____ Date Signed_____

Social Security No._____ Local Union No._____

2 *Section 43-A of the 1981 Master Agreement provides:*

> Effective for all work performed on and after January 1, 1981, . . . the amount covered by the Supplemental Dues option in connection with the Vacation and Holidays contribution, amounting to a total of twenty-five cents (25¢) per hour, shall be remitted by the individual employer as follows:

(1) The individual employer shall include such amount in the single check mailed with his combined employer report of contributions to the Depository Bank for the Northern California Carpenters Trust Funds.

(2) In such report the individual employer shall designate the Depository Bank as his or its agent to receive written dues authorizations from employees covered by this Agreement pursuant to Section 302(c)(4) of the Labor-Management Relations Act, as amended, and any revocation of such authorizations, and shall direct the Bank (a) to deposit the monies reported under the column headed Supplemental Dues (Column B) in a special account, (b) to transfer monthly from such account the monies paid with respect to the work of each employee who has on file with the Bank an unrevoked dues authorization in a form complying with law to the account of the Union as supplemental dues and (c) to transfer the remaining monies in said account to the Carpenters Vacation and Holiday Trust Fund for Northern California for credit to the vacation and holiday accounts of the other employees. Any delinquency in the payment of such amount shall be subject to the same liquidated damage, interest and other delinquency provisions applicable to contributions to the Northern California Carpenter Funds.

The dues authorization form was revised to read:

Authorization For Supplemental Dues Check-Off

I hereby authorize all individual employers, individually and collectively, to deduct the amount specified in Section 43-A of the Carpenters Master Agreement . . . from my wages for hours paid for or worked by me on or after January 1, 1981, and remit said amount directly to the Carpenters 46 Northern California Counties Conference Board or to the appropriate District Council or Local Union as said Conference Board may direct as supplemental dues. This authorization may be revoked by me in writing to Lloyds Bank California, as the agent for this purpose of the individual employer at P. O. Box 45930, Rincon Annex, San Francisco, California 94145, within the 30-day period prior to the expiration of said Master Agreement . . . or one year from the date hereof whichever is sooner. If not revoked, this authorization shall be deemed as renewed from year to year thereafter.

Name	SS No.	Local Union No.
Signature		Date

The form that the individual employer used to remit payments required by the 1981 Master Agreement was revised to include the following certification:

By submitting this report the above-named employer certifies the following: . . . (5) that the depository bank is designated by the employer as his or its agent to receive written dues authorizations from such employees pursuant to Section 302(c)(4) of the LMRA, and any revocations of such authorizations; (6) that said bank is directed by the employer (a) to deposit the monies reported herein under Vacation and Holiday - Column B - Supplemental Dues in a special account, (b) to transfer monthly from such account the monies paid with respect to the work of each employee who has on file with the bank an unrevoked dues authorization in a form complying with law to the account of the Carpenters 46 Northern California Counties Conference Board as supplemental dues and (c) to transfer the reraining monies to the Carpenters Vacation and Holiday Trust Fund for Northern California for credit to the Vacation and Holiday accounts of the other employees . . .

Date	Signature	Title

3 For each employee who has authorized a check-off of dues, the Union receives a monthly disbursement from Lloyds in payment of supplemental dues for all work performed that month by that employee for all employers. Conversely, for each employee who has not authorized a check-off, the bank transfers the amount previously designated as "supplemental dues" to the Trust Fund for Credit to the employee's vacation and holiday benefits account. The Union must obtain the supplemental dues owned by that employee in some other manner.

4 Since the 1978 Master Agreement has now been modified in an attempt to correct prior defects and since there is no showing that either the Union or ABC or any employers intend to reinstitute the earlier procedures, we review the denial of ABC's request for injunctive and declaratory relief solely in regard to the propriety of the 1981 Master Agreement. *See, e.g., County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

5 At various points in the proceedings below, ABC contended that the Union should be required to return to ABC member employers or to the Trust Fund monies received under the 1978 and 1981 Master Agreements in violation of §302 of the LMRA. We need not reach these claims on this appeal, however.

ABC's request that the Union be ordered to return to ABC member employers monies unlawfully received by the Union must be denied. As to monies received under the 1981 Master Agreement, our conclusion *infra* that the procedures thereunder comply fully with the §302(c)(4) exception make such relief unnecessary. As to monies received by the Union under the 1978 Master Agreement, even assuming *arguendo* that such payments were unlawful under §302, only the Trust Fund or its employee beneficiaries—and not ABC or its member employers—are entitled to a return of those monies. Designated by the employer as vacation and holiday benefits compensation and transferred to the Trust Fund before being sent to the Union, such monies, even if not properly transferable by the Trust Fund to the Union as "supplemental dues," certainly could not be returned to the employer. Such a transfer would violate the terms of the trust agreement between the parties, which provides: "No Individual Employer shall have any right, title or interest in such payments, [i.e., contributions to the Fund designated as vacation holiday and benefits,] or any part thereof, and no part thereof shall revert to any such Individual Employer."

ABC's request that the Union be ordered to return to the Trust Fund monies unlawfully received by the Union must also be denied on this appeal. While ABC's amended complaint requested the Union to return to the Trust Fund monies received by the Union in violation of section 302, ABC never pressed that claim for relief in district court. When defendants moved for dismissal or summary judgment on the ground that the changes in procedure embodied in the 1981 Master Agreement "mooted" plaintiffs' claims for relief, ABC defended the continuing "live" nature of its claim solely on the ground that even if the court were to find the pre-1981 defects remedied by the procedures set forth in the 1981 Master Agreement, plaintiffs' claim for damages and the "return [to the employers] of all monies contributed to the trust fund from January 1, 1978" onward remained justiciable:

> Even if defendant could convince the court that it is now complying with section 302 and with respect to these Plaintiffs, Plaintiffs are still seeking the reimbursement of monies up until the date of compliance.

Both the Trust Fund defendant and the district court asserted that the employers' claim for reimbursement for monies paid under the 1978 Master Agreement was "inconceivable," yet plaintiffs never responded that a return of monies to the Trust Fund—and not to the employers—was the desired relief.

In view of ABC's abandonment below of its claim for the return of monies to the Trust Fund and in light of the failure of the Trust Fund and its trustees, both parties to this action, to assert such a request for relief on appeal, we decline to address that claim here. We address neither ABC's standing to raise such a claim on behalf of the Trust Fund nor the propriety of a return of such pre-1981 Master Agreement payments to the Trust Fund.

6 ABC also argues that the supplemental dues are not "membership dues" because the obligation to pay the supplemental dues is imposed not on all members but only on those Union members who find employment as carpenters. ABC assumes that in order to constitute "membership dues" under §302(c)(4), the supplemental dues must qualify as "periodic dues and . . . initiation fees uniformly required as a condition of acquiring or retaining membership" under §8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3)(1976). The supplemental dues, ABC argues, are not uniformly required because they are not imposed on all Union members.

We do not agree. Assuming *arguendo* that §302(c)(4) "membership dues" must be "uniformly required" within the meaning of §8(a)(3), *but see UMW Local 515 v. American Zinc, Lead & Smelting Co.*, 311 F.2d 656, 659-60 (9th Cir. 1963), a dues structure that bases the amount of compulsory dues on the size of an employee's earnings nonetheless meets the uniformity requirement of §8(a)(3), *see Aluminum Workers Trades Council*, 185 N.L.R.B. 69, 70 (1970); *cf. Bagnall v. Air Line Pilots Ass'n*, 626 F.2d 336, 339-40 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981) (construing §2, Eleventh of the Railway Labor Act). *See also Schwartz v. Associated Musicians, Local 802*, 340 F.2d 228, 233-34 (2d Cir. 1964) (monies collected from 1-½% levy on all members' earnings deemed "membership dues" within §302(c)(4)).

7 Section 2, Eleventh (b) provides that an employee's authorization for a dues check-off "shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective bargaining agreement, whichever occurs sooner." 45 U.S.C. §152, subd. 11(b)(1978).

8 Section 302(c)(6) of the Act, 29 U.S.C. §186(c)(6)(Supp. II 1978), permits employers to make payments to a vacation and holiday trust fund established by a union, if and only if the payments are for the purpose of vacation and holiday benefits.

9 The provisions of the Trust Fund agreement themselves specifically provide that "all contributions to the fund shall be deemed to be . . . a part of the wages due to the [e]mployees."

10 Only the amounts actually authorized by employees to be deducted as dues are in fact transmitted to the Union as dues. An employee who does not authorize the check-off of supplemental dues from wages never in fact has any supplemental dues deducted from his wages, since the amount the employer remits to Lloyds as "supplemental dues" will eventually be received by the employee from the Trust Fund in the form of extra holiday and vacation pay. The nonauthorizing employee also receives any interest earned on monies in the account at Lloyds during the time between the deposit of the monies in the Lloyds account and transfer of those monies to the employee's Trust Fund account.

11 ABC asserts on appeal that the Union uses Trust Fund assets to collect delinquent dues. This allegation does not appear in ABC's complaint nor does

ABC support it with any reference to the affidavits and collective bargaining agreements in the record. Because ABC has failed to substantiate this factual assertion as required by Fed. R. App. P. 28 (a)(3) and (e), we decline to consider it. *See Mitchel v. General Elec. Co.*, 689 F.2d 877, 878 (9th Cir. 1982).

12 The trustees appear to have considerable control over the bank's disbursement to the Union. Although the employees send their authorization cards to the bank, the bank in turn sends the cards to the Trust Fund. On the basis of the authorization cards, the Trust Fund instructs the bank each month as to how much money to pay the Union and to the Trust Fund.

United States District Court For the Northern District of California

FILED FEBRUARY 20, 1981

ASSOCIATED BUILDERS & CONTRACTORS, Northern California and Golden Gate Chapters, Ind., and on behalf of their members; *OPINSKI CONSTRUCTION*; *THORNHILL CONSTRUCTION COMPANY*; *FRANK TORRES CONSTRUCTION COMPANY*; *WHITAKER CONSTRUCTION, INC.*; *GREAT WESTERN CONSTRUCTION INC.*; *DRW CONSTRUCTION*; *WILLARD ENTERPRISES*, et al., *Plaintiffs,*	No. C 80 2918 SW
vs.	
CARPENTERS VACATION and HOLIDAY TRUST FUND for NORTHERN CALIFORNIA and *PAUL R. BALDACCI*; *GORDON W. HANSON*; *CLEMENT A. CLANCY*; *BUDD O. STEVENSON*; *A.A. SHANSKY*; *RAYMOND SCHEFFEL*; *PHIL GILLIS*; *HOYLE HASKINS*, Ind., and as trustees for said Carpenters Vacation and Holiday Trust Fund; *CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO*, et al., *Defendants.*	

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

One June 14, 1980 plaintiffs filed this class action on behalf of all contractors who have paid monies to defendant Carpenters Vacation and Holiday Trust Fund of Northern California (defendant Fund) against defendant Fund, its Trustees, and defendant Carpenters 46 Northern California Counties Conference Board of the United Brotherhood of Carpenters and Joiners of America (AFL-CIO) and its individual member unions (defendant Union).

The Complaint charges: (a) defendant Fund pays monies directly to the defendant Union and is thus structurally defective; (b) defendant Trustees have created and condoned this defect; and (c) defendant Union wrongfully has demanded and accepts said payments. The Complaint prays that as a result of this structural defect, the court should enjoin further payments from the defendant Fund to defendant Union, appoint a receiver to manage the Fund during the conduct of this litigation, and ultimately, order defendant Union to return to plaintiffs all monies received and spent pursuant to such allegedly illegal procedure (approximately twenty-six million dollars).

Following extensive briefing and argument, the matter was finally submitted on December 1, 1980.

For the reasons hereinafter stated, plaintiffs' motion is denied.

The controversy swirls primarily around Sections 43 and 43A of the Collective Bargaining Agreement between defendant Union and Northern California Home Builders Conference and the California Contractors Council. This agreement, which became effective on June 16, 1980, is a continuation of a series of similar collective bargaining agreements starting in 1971. Section 43 provides that for each hour worked by an employee covered by the agreement, each employer shall contribute to defendant Fund, for the benefit of such employee, an amount set by Section 40 of the Agreement. The amounts contributed to the Fund are deemed compensation and are distributed annually (in January) to the employees for whom the funds are accumulated.

Effective January 1, 1978 the Collective Bargaining Agree-

ment was amended (Section 43A) to allow employees to authorize a check off of supplemental dues in the amount of ten cents per hour worked. The check off authorization form specifies that on the first of every month defendant Fund shall deduct the supplemental dues from the Vacation and Holiday Fund and transmit the same to defendant Union.

Plaintiffs argue this is a violation of Section 302(b) of the NRLA which forbids any direct payments from an employer to a Union. The argument is based on the premise that defendant Fund is acting as an agent for defendant Union. The argument however, is not supported by the facts.

Defendant Fund was established by mutual agreement of both parties to the Collective Bargaining Agreement—the Employers and the Union. As created, it acts as a fiscal intermediary on behalf of both parties. It accepts from the various employers for whom a union member might work its contributions to the Vacation and Holiday Fund, and credits such amounts to the account of the individual union member. In addition, it serves the employer by determining which employees have filed check off authorizations and makes their payments to the Union. This is a bookkeeping and disbursement function that would be Employers' responsibility were the check off authorization filed directly with them. It serves the Union by making these monthly payments of supplementary dues, and the Union members by servicing their Holiday and Vacation benefits and, when requested, for payment of their dues. Contrary to plaintiffs' claim, the payments are not directly from the Employer to the Union, nor is defendant Fund acting solely—or even primarily—on behalf of defendant Union.

Grounds for granting or denying the requested relief rest to a large extent on the discretion of the Court. Since injunctive relief is viewed as an extraordinary remedy, it is to be denied unless there is a clear showing that all the essential elements for issuance have been met. These are, of course:

(1) The threat of irreparable harm to plaintiffs if the relief is not granted;

(2) The state of the balance of harm to the plaintiffs if the relief is not granted and harm to the defendants if it is;

(3) Probability of plaintiffs' ultimate success on the merits; and

(4) The public interest.

In the Court's view, there is a substantial short fall in the merit of plaintiffs' argument that it faces irreparable harm if the request for preliminary injunction is not granted. It is true, as plaintiffs assert, that substantial monies are involved. But these are not *plaintiffs'* monies and it would be inconceivable that they would ever be returned to plaintiffs, or to plaintiffs' class if there be one.

The monies are earned by individual Union member employees. They are wages for which required State and Federal taxes have been withheld. They are paid to defendant Fund pursuant to the Collective Bargaining Agreement. Some of these funds are distributed annually to the employees as their Holiday and Vacation benefit. Another portion is paid by defendant Fund to the Union pursuant to specific written authorization from individual employees. Even if we were to assume, arguendo, that the procedure is somehow defective, it is difficult to see how it irreparably harms plaintiffs. Plaintiffs' strident cry that the public interest will suffer irreparable harm because these are illegally obtained monies being used for improper political purposes lacks sufficient factual or legal support to be given serious attention. The funds are being spent as any other union's funds have and may be spent. The illegal collection, if one there be, does not make the purpose for which they are spent also illegal.

While the foregoing is, by itself, ample ground for denying the relief sought, a brief discussion of at least one additional short fall seems appropriate—balance of the equities.

The balance is not, as plaintiffs argue, plaintiffs' possible loss of its ability to obtain the repayment it seeks against defendants' mere temporary loss of use of the money pending ultimate resolution of the litigation. As mentioned above, it is inconceivable under the facts of this case that plaintiffs would ***ever*** receive a repayment no matter what the Court's ultimate conclusion as to the validity of the fiscal intermediary system employed here. The *actual* balance of equities is between plaintiffs' being compelled to disburse these funds, duly earned by the union members, through a possibly defective

distribution system, against defendant Union's loss of its monthly receipt of check off dues and possible interference with distribution of annual Vacation and Holiday benefits to the individual members. And, in this Court's opinion, the harm flowing to defendant Union from the latter instance is substantial, while that suffered by plaintiffs from the former is not.

Accordingly, plaintiffs' motion for preliminary injunction is HEREBY ORDERED DENIED.

In order to discuss the future direction of this litigation and the impact thereon, if any, of the alleged changes in the procedures for payment of supplemental dues mentioned in open court on November 20, 1980,

IT IS HEREBY ORDERED that the parties appear for a status conference on March 4, 1981 . . . 11 a.m.

DATED: 20 FEB 1981

SPENCER WILLIAMS
UNITED STATES DISTRICT JUDGE

LAW OFFICES OF MARK R. THIERMAN
MARK R. THIERMAN
PAUL V. SIMPSON
JOSEPH M. SWEENEY
649 Mission Street, Suite 320
San Francisco, California 94105
Telephone: (415) 777-0944
(916) 972-9229
Attorneys for Plaintiffs

United States District Court

Northern District of California

FILED SEPTEMBER 8, 1981

ASSOCIATED BUILDERS & CONTRACTORS, Northern California and Golden Gate Chapters, individually and on behalf of their members; OPINSKI CONSTRUCTION; THORNHILL CONSTRUCTION COMPANY; FRANK TORRES CONSTRUCTION COMPANY; WHITAKER CONSTRUCTION, INC.; DRW CONSTRUCTION; WILLIARD ENTERPRISES, INC. on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA and PAUL R. BALDACCI; GORDON W. HANSON; CLEMEMT A. CLANCY; BUDD O. STEVENSON; A.A. SHANSKY; RAYMOND SCHEFFEL; PHIL GILLIS; HOYLE HASKINS, individually and as trustee for said Carpenters Vacation and Holiday Trust Fund; CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD OF THE UNITED BROTHERHOOD OF CARENTERS AND JOINERS OF AMERICA (AFL-CIO) on behalf of itself and its member union,

Defendants.

Civil Action No. C-80-2918 SW

ORDER DENYING REQUEST FOR RECONSIDERATION OF DENIAL OF PRELIMINARY INJUNCTION

This cause came on to be further heard on Motion of Plaintiffs for reconsideration for the Court's Order denying a preliminary injuction, and appearing to the Court, having considered the files, records, pleadings and Exhibits thereto, and having heard oral evidence in open Court, that the relief herein granted is not necessary to perserve the status quo and for the reasons stated in the Court's Order of February 20, 1981 in this case, the Motion is hereby denied.

Dated: 28 SEP 1981

SPENCER WILLIAMS
United States District Judge

LAW OFFICES OF MARK R. THIERMAN
MARK R. THIERMAN
PAUL V. SIMPSON
JOSEPH M. SWEENEY
649 Mission Street, Suite 320
San Francisco, California 94105
Telephone: (415) 777-0944
(916) 972-9229
Attorneys for Plaintiffs

United States District Court

Northern District of California

FILED SEPTEMBER 18, 1981

ASSOCIATED BUILDERS & CONTRACTORS, Northern California and Golden Gate Chapters, individually and on behalf of their members; OPINSKI CONSTRUCTION; THORNHILL CONSTRUCTION COMPANY; FRANK TORRES CONSTRUCTION COMPANY; WHITAKER CONSTRUCTION, INC.; DRW CONSTRUCTION; WILLARD ENTERPRISES, INC. on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA and PAUL R. BALDACCI; GORDON W. HANSON; CLEMEMT A. CLANCY; BUDD O. STEVENSON; A.A. SHANSKY; RAYMOND SCHEFFEL; PHIL GILLIS; HOYLE HASKINS, individually and as trustee for said Carpenters Vacation and Holiday Trust Fund; CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD OF THE UNITED BROTHERHOOD OF CARENTERS AND JOINERS OF AMERICA (AFL-CIO) on behalf of itself and its member union,

Defendants.

Civil Action No. C-80-2918 SW

ORDER DENYING INJUNCTION PENDING APPEAL

This cause came on to be further heard on Motion of Plaintiffs for an injunction pending appeal, and it appearing to the Court, having considered the files, records, pleadings and Exhibits thereto, and having heard oral evidence in open

Court, that relief herein granted is not necessary to preserve the status quo pending appeal by Plaintiffs to the United States Court of appeals for the Ninth Circuit; the Motion is hereby denied.

Dated: 28 SEP 1981

SPENCER WILLIAMS
United States District Judge

United States District Court

Northern District of California

ENTERED NOVEMBER 25, 1981

ASSOCIATED BUILDERS & CONTRACTORS, etc.,

Plaintiffs,

v.

CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA, et al,

Defendants.

Civil Action No. C-80-2918 SW
Labor-Management Relations
Judgment and Order

The motions of defendants for the dismissal of the above-entitled action on the ground of mootness and for summary judgment having come on regularly for hearing by the Court on Wednesday, November 4, 1981; Mark R. Thierman, Esq., having appeared for plaintiffs, Messrs. Johnson & Stanton by Thomas E. Stanton, Jr., Esq., having appeared for defendants Carpenters Vacation and Holiday Trust Fund for Northern California and its Trustees and Messrs. Van Bourg, Allen, Weinberg & Roger by Michael B. Roger, Esq., having appeared for defendant Carpenters 46 Northern California Counties Conference Board of the the United Brotherhood of Carpenters and Joiners of America (AFL-CIO) on behalf of itself and its member unions; the Court having considered the briefs and arguments of counsel and the declarations and other papers on file herein, hereby finds that the parties to the Carpenters 46 Northern California Counties Agreements and the 46 Counties Piledriving Agreement established by collective bargaining and implemented effective January 1, 1981, modified dues check off procedures which comply with the requirements of Seciton 302(c)(4) of the Labor-Management Relations Act, 29 U.S.C. §186 (c)(4), and which were within their negotiating authority under federal labor policy, thereby rendering moot plaintiffs' attack on the validity on the Vacation

and Holiday Fund Trust Agreement and their request for relief against defendants, and hereby determines that there is no genuine issue as to any material fact and that said defendants are entitled to a judgment in their favor as a matter of law:

It is hereby ORDERED, ADJUDGED AND DECREED that:

1. Defendants motions be and the same are hereby granted.
2. Plaintiffs' first amended complaint, and each claim or cause of action asserted therein against defendants, and each of them, be and the same hereby are dismissed with prejudice.

Dated: November 25, 1981

_____

UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For the Ninth Circuit

FILED AND ENTERED MARCH 10, 1983

ASSOCIATED BUILDERS & CONTRACTORS, et al.,
Plaintiffs/Appellants,

v.

CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA et al.,
Defendants/Appellees.

No. 81-4122
81-4359
81-4687
DC#:
CV-80-2918-SW

APPEAL from the United States District Court for the NORTHERN District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the NORTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeals in Nos. 81-4122 and 81-4359, are DISMISSED. In appeal No. 81-4687 summary judgment is AFFIRMED.

TEXT OF SECTION 302 OF THE LABOR MANAGEMENT RELATIONS ACT (1976) 29 U.S.C. §186

SEC. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representation of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of *property in commerce, or the employer of any such operator,* any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as

a fee or charge for the unloading, or the connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependants (or of such employees, families, and dependants jointly with the employees of other employers making similar payments, and their families and dependants): *Provided:* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependants, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from

occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or anuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship, or other training program: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer

shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the provisio to clause (5) of this subsection shall apply to such trust funds*; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the provisio to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended, or this Act; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor Management Reporting and Disclosure Act of 1959.*

(d) Any person who willfully violates any of the provisons of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplemental existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C. title 15, sec. 17, and title 28, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved

March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to Januray 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

---

*Sec. 302(c)(7) has been added by Public Law 91-86, 91st Cong., S. 2068. 83 Stat. 133, approved Oct. 14, 1969; Sec. 302(c) (8) was added by Public Law 93-95, 93d Cong., S. 1423, 87 Stat. 314-315, approved Aug. 15, 1973.

ERISA, §§3(1), (4), (5), (6) and (14) (A)(B)(C)(D) and (E); 29 U.S.C. §§ 1002(1), (4), (5), (6) and (14) (A)(B)(C)(D) and (E).

DEFINITIONS

SEC. 3. For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

• • •

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

• • •

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

ERISA §403 (c)(1), 29 U.S.C. § 1103 (c)(1).

ESTABLISHMENT OF TRUST

(c)(1) Except as provided in paragraph (2) or (3) or subsection (d), or under section 4042 and 4044 (relating to termination of insured plans), the asset of a plan shall never insure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

ERISA §404 (a)(1), 29 U.S.C. § 1104 (a)(1).

FIDUCIARY DUTIES

SEC. 404.(a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of;

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1) (C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d) (4) and (5)).

ERISA §406(a)(1) and (b), 29 U.S.C. §1106(a)(1 and (b).

PROHIBITED TRANSACTIONS

SEC. 406 (a) Except as provided in section 408:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a)

• • •

(b) A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

ERISA §409, 29 U.S.C. §1109.

LIABILITY FOR BREACH OF FIDUCIARY DUTY

SEC. 409 (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

(b)No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

ERISA §502, 29 U.S.C. §1132.

CIVIL ENFORCEMENT

SEC. 502 (a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this

section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 (or with respect to which an application to so qualify has been filed and has to been finally determined) the Secretary may exercise his authority under subsection (a) (5) with respect to a violation of, or the enforcement of, parts 2 and3 of this subtitle (relating to participation, vesting, and funding), only if—

(1)(A) requested by the Secretary of the Treasury, or

[1](B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribed by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate any action to enforce section 515.

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an employee benefit plant in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place,

or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g)(1) In any action under this title (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

"(i) interest on the unpaid contibutions, or

"(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954.

(h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action

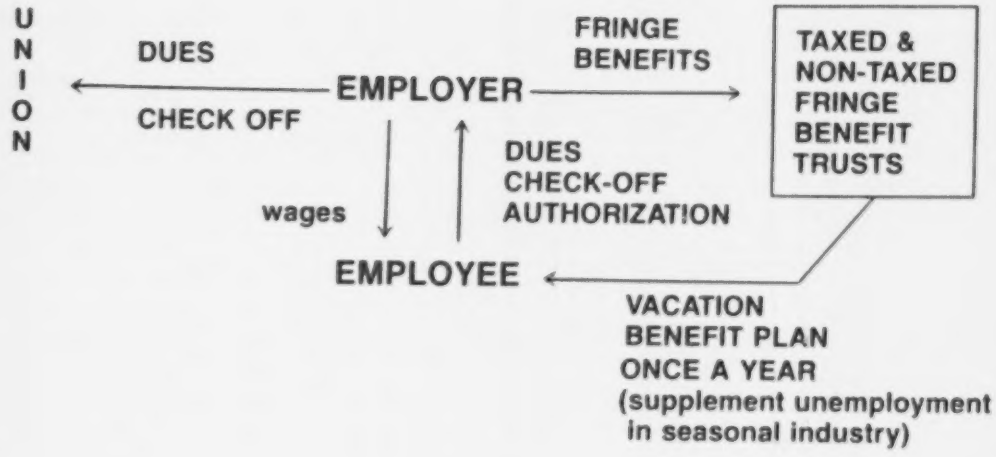
under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the internal Revneue Code of 1954); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975 (e)(1) of such Code.

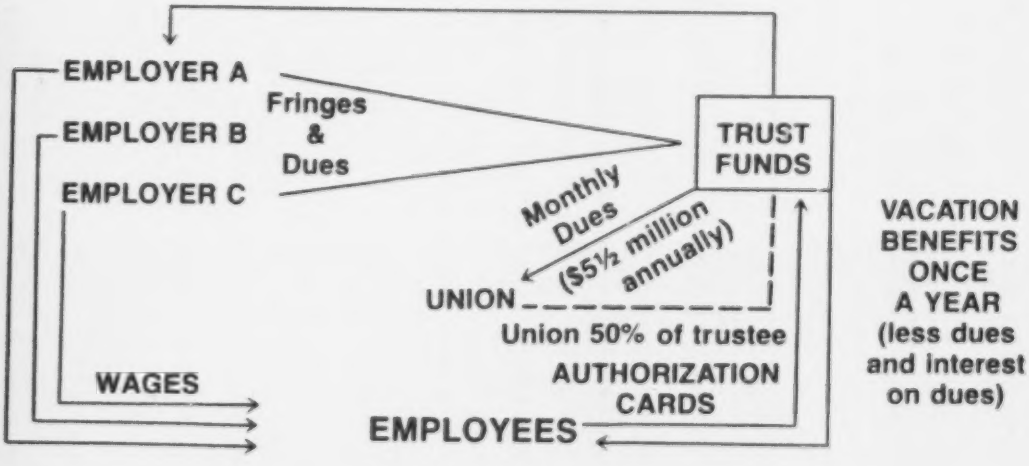
(j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

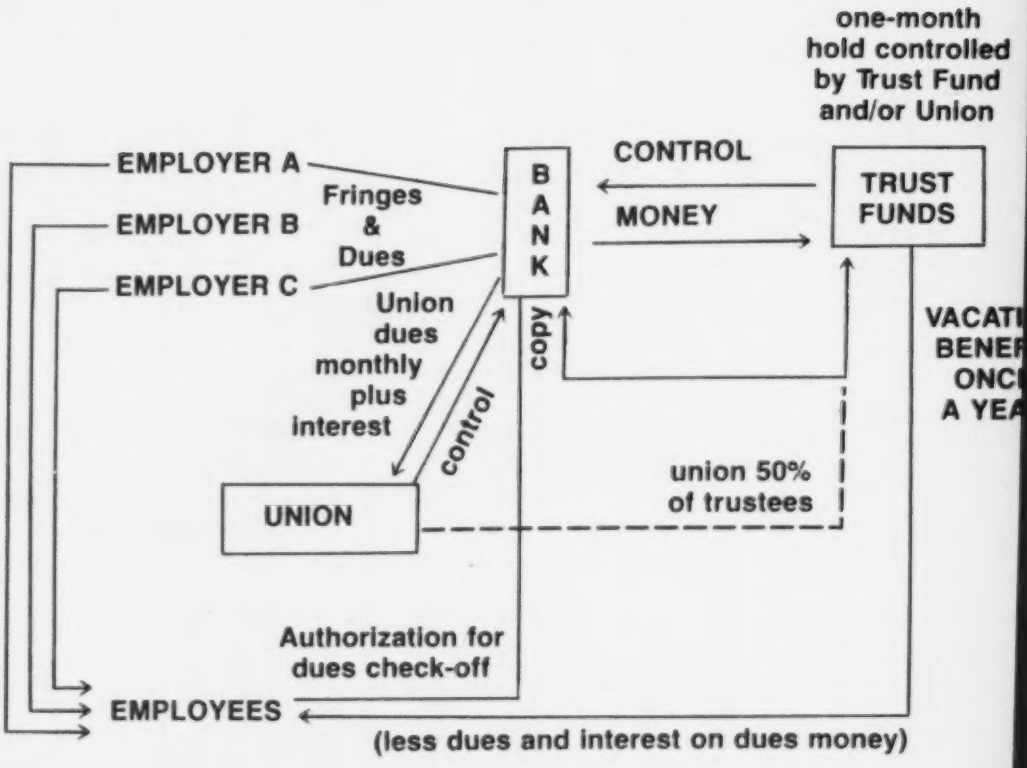
LAWFUL DUES CHECK-OFF



PRE 1981 SCHEME



POST 1981 SCHEME



Note: Union gets interest on money held as dues.

Employee vacation fund suffers one month "delay" while bank clears checks.

"Old" check-off and "new" check-off cards used interchangeably.

Bank investing money at Trustee funds/Union request.

Fund (not Bank) impliments dues check-off (keep cards, determines amounts, etc.)

AGREEMENT

It is hereby agreed by and between the undersigned parties to that agreement known as the Carpenters 46 Northern California Counties Agreement that said Agreement shall be modified and amended effective January 1, 1981, as follows:

1. The provisions of Section 36, as amended by the agreement dated June 15, 1977, and the reference to "Trust Fund Enforcement (Section 36)" under the heading "Fringe Benefits" in Section 40, are deleted.

2. The amount listed for Supplemental Dues under "Vacation" below the "Fringe Benefits" heading in section 40 is increased from $.20 Total to $.25 Total effective for all work performed on and after January 1, 1981.

3. The following paragraph is added to Section 43:

"The parties agree that up to a maximum of $100,000 in any one calendar year shall be provided to insure employer contributions to the Vacation and Holiday Fund, which after all practical legal and administrative means of collection available to the Fund and the Union have been exhausted, have been declared uncollectible by the Joint Delinquency Committee of the Northern California (MWW R Bes) Carpenters Funds. Of this amount, up to $50,000 shall be provided by the Union; and up to $50,000 shall be provided by the Construction Industry Advancement Fund and the California Construction Advancement Program, in proportion to the amount of contributions received in the calendar year by such Fund and Programs, respectively."

The following paragraphs are added to Section 43A:

"Effective for all work performed on and after January 1, 1981, the provisions of the first paragraph of this Section shall not apply, and the amount covered by the Supplemental Dues option in connection with the Vacation and Holiday contribution, amounting to a total of twenty-five cents (.25¢) per hour, shall be remitted by the individual employer as follows:

(1) The individual employer shall include such amount in the single check mailed with his combined employer report of contributions to the Depository Bank for the Northern California Carpenters Trust Funds.

(2) In such report the individual employer shall designate

the Depository Bank as his or its agent to receive written dues authorizations from employees covered by this Agreement pursuant to Section 302(c)(4) of the Labor-Management Relations Act, as amended, and any revocation of such authorizations, and shall direct the Bank (a) to deposit the monies reported under the column headed Supplemental Dues (Column B) in a special account, (b) to transfer monthly from such account the monies paid with respect to the work of each employee who has on file with the Bank an unrevoked dues authorization in a form complying with law to the account of the Union as supplemental dues and (c) to transfer the remaining monies in said account to the Carpenters Vacation and Holiday Trust Fund for Northen California for credit to the vacation and holiday accounts of the other employees. Any delinquency in the payment of such amount shall be subject to the same liquidated damage, interest and other delinquency provisions applicable to contributions to the Northern California Carpenter Funds.

It is the intent and purpose of the parties to comply fully with all laws, rules and regulations applicable to the dues check-off provided by this Section. If any provision of this Section, or any procedure in the implementation or administration of this Section, is determined to violate any such law, rule or regulation, the parties will promptly enter into lawful negotiations to correct such violation.

The Union shall exonerate, reimburse and save harmless the Employer, each individual employer, the Bank or other depository designated pursuant to this Section and the Carpenter Funds Administrative Office of Northern California, Inc., and their respective officers, directors, agents, and

employees, individually and collectively, against any and all liabilities and reasonable expenses arising out of the payment, receipt or distribution of the amounts listed in section 40 for Supplemental Dues."

Executed this 23 day of February, 1981

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., BAY COUNTIES GENERAL CONTRACTORS ASSOCIATION, INC.	CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD
BY _____	BY _____
BY _____	BY _____
BY _____	BY _____

NORTHERN CALIFORNIA CARPENTERS C[illegible] EMPLOYER REPORT OF CONTRIBUTIONS (415) 777-[illegible]

The reported contributions are due and payable on or befo[illegible] [illegible]th day following month in which employment occurred

D[illegible]E OF NON-REPORT

IDENTIFICATION NUMBER	TRANS	Submit reports for months as indicated by * below.

(1) NAME & ADDRESS

(2) REPORT FOR MONTH OF

	HEALTH & WELFARE	PENSION	VACATION & HOLIDAY	APPRENTICESHIP	INDUSTRY ADVANCEMENT	BENEFIT COLLECTION & ENFORCEMENT			
(3) TOTAL HOURS FROM LINE (13)	TOTAL OF COL. (10)	TOTAL OF COL. (11)	TOTAL OF COL. (12)	TOTAL OF COL. (11)	TOTAL OF COL. (11)	TOTAL OF COL. (11)			
RATE PER HOUR	X	X	X	X	X	X			
(4) CONTRIBUTION									
(5) ADJUSTMENTS (See Instructions)									
(6) PRIOR BALANCE A DISCREPANCY B LIQ. DAMAGE									
(7) REMITTANCE A (Total lines 4, 5, 6A and 6B)									

8 Add Line 7A, for all Trust Funds, enter total here and make single check payable to: NO. CALIF. CARPENTER FUNDS ——→ $

<u>Mail check, original and yellow copy of this report to:</u> LLOYDS BANK CALIFORNIA
P.O. Box 45930, Rincon Annex, San Francisco, CA 94145

REPORT OF COMPENSABLE HOURS OF CARPENTERS AND PILEDRIVERMEN

SOCIAL SECURITY NUMBER (8)			NAME OF EMPLOYEE (TYPE OR PRINT) (9) LAST FIRST MIDDLE INITIAL	Carpenters Health & Welfare Trust Fund for California (10)	Carpenters Pension Trust Fund for No. California (11)	Carpenters Vacation and Holiday Trust Fund for Northern California (12)				
(13) Total Number of Hours on this and all continuation sheets by Columns (10, 11, 12) Enter these totals on line 3										

By submitting this report the above-named employer certifies the following: (1) that the information contained on this sheet and all continuation sheets is correct, (2) that all compensable hours paid to carpenters, piledrivermen and other employees subject to being reported to the Northern California Carpenters Funds employed by such employer during the period covered are reported herein, (3) that such employer is bound by, and all payments reported herein are made under and pursuant to the appropriate written agreements [illegible] [illegible] the Funds as required by Section 302(c) [illegible] of the Labor-Management Relations Act, as amended, (4) that all persons reported are employees of such employer within the meaning of the Act and ERISA, (5) that the depository bank is authorized by the employer to transfer the monies remitted herewith to the appropriate Funds in accordance with instructions issued by the appropriate Boards of Trustees, and (6) that this report, whether or not signed in the space provided below, is being submitted by the employer or a duly authorized representative of the employer.

(14) DATE SIGNATURE TITLE

If there is not enough space to list all employees above, use Continuation Sheet #[illegible]. Please read instructions [illegible] carefully, particularly regarding Vacation Column (12) & Apprenticeship Contributions.

FORM [illegible] REV. [illegible]

EXHIBIT 4

ORIGINAL TO ACCOMPANY YOUR REMITTANCE

NORTHERN CALIFORNIA CARPENTERS CO[illegible] REPORT OF CONTRIBUTIONS (415) 777 [illegible]

[illegible] contributions are due and payable on or before [illegible] following month in which employment occurred

IDENTIFICATION NUMBER	TRADE

NOTICE OF NON REPORT

Submit reports for months as indicated by * below

(1) NAME & ADDRESS

(2) REPORT FOR MONTH OF

	HEALTH & WELFARE	PENSION	VACATION & HOLIDAY COL. A	VACATION & HOLIDAY SUPPL. DUES OPTION COL. B	APPRENTICESHIP	INDUSTRY ADVANCEMENT
(3) TOTAL HOURS FROM LINE (13)	TOTAL OF COL. (10)	TOTAL OF COL. (11)	TOTAL OF COL. (12)	TOTAL OF COL. (12)	TOTAL OF COL. (11)	TOTAL OF COL. (11)
RATE PER HOUR	X	X	X	X	X	X
(4) CONTRIBUTION						
(5) ADJUSTMENTS (See Instructions)						
(6) PRIOR BALANCE A DISCREPANCY B LIQ. DAMAGE						
(7) REMITTANCE A (Total lines 4, 5, 6A and 6B)						

8 Add Line 7A for all columns, enter total here and make single check payable to: NO. CALIF. CARPENTERS FUNDS OFFICE ——► $

Mail check, original and yellow copy of this report to: LLOYDS BANK CALIFORNIA
P.O. Box 45930 Rincon Annex San Francisco, CA 94145

REPORT OF COMPENSABLE HOURS OF CARPENTERS AND PILEDRIVERMEN

SOCIAL SECURITY NUMBER (8)	NAME OF EMPLOYEE (TYPE OR PRINT) (9) (LAST) (FIRST) (MIDDLE INITIAL)	Carpenters Health & Welfare Trust Fund for California (10)	Carpenters Pension Trust Fund for No. California (11)	Carpenters Vacation and Holiday Trust Fund for Northern California (12)

(13) Total Number of Hours on this and all continuation sheets by Columns (10, 11, 12). Enter these totals on line 3

By submitting this report the above-named employer certifies the following: [illegible]

(14) DATE SIGNATURE TITLE

If there is not enough space to list all employees above, use Continuation Sheet [illegible] particularly regarding Vacation Column (12) & Apprenticeship Contribution.

FORM [illegible]

EXHIBIT 5

ORIGINAL TO ACCOMPANY YOUR REMITTANCE

No. 82-2033

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

ASSOCIATED BUILDERS & CONTRACTORS, etc., et al.,
Petitioners,

vs.

CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA, et al.,
Respondents.

BRIEF OF TRUST FUND RESPONDENTS

**In Opposition
to the Petition for a Writ of Certiorari to
the United States Court of Appeals for the
Ninth Circuit**

Of Counsel:
JOHNSON & STANTON
San Franciso, CA

THOMAS E. STANTON, JR.
COUNSEL OF RECORD
221 Sansome Street
San Francisco, CA 94104
Telephone: (415) 981-3211
Counsel for Trust Fund Respondents

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

No. 82-2033

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ASSOCIATED BUILDERS & CONTRACTORS, etc., et al.,
Petitioners,

VS.

CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA, et al.,
Respondents.

BRIEF OF TRUST FUND RESPONDENTS

In Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Respondents Carpenters Vacation and Holiday Trust Fund for Northern California and Gordon W. Hanson; Richard Clark; Charlie Petersen; James Whittaker, Hoyle Haskins; L.E. Bee; Russell Pool, individually and as trustees for said Carpenters Vacation and Holiday Trust Fund ("Trust Fund respondents") oppose the petition for writ of certiorari filed herein and respectfully submit that the petition should be denied for the following reasons:

I

PRELIMINARY STATEMENT

This case does not present the questions stated by petitioners in their petition.

The issues posed by those questions relate to the dues check-off procedure in effect prior to the 1981 amendment to the applicable collective bargaining agreement (the 1981 Master Agreement). The Court of Appeals expressly refrained from deciding those issues for the reasons given in footnotes 4 and 5 to its opinion (Appendix to Petition, pp. 13-14). Respondents submit that these reasons are valid. It is clear, moreover, that the sufficiency of the reasons does not warrant plenary review by this Court.

II

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals held that the dues check-off procedure provided in the 1981 Master Agreement complied with the requirements of Section 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(4), and was therefore valid.

The Court summarized the procedure as follows (Appendix to Petition, pp. 3-4, 13):

> "Under the 1981 Master Agreement, supplemental dues are assessed against each employee at the rate of twenty-five cents per hour worked. Every month, each employer sends a check in an amount equal to the total supplemental dues assessed against all employees working for that employer during that month to the employer's designated agent, Lloyds Bank of California (Lloyds). For each employee's paycheck, the amount remitted to Lloyds as supplemental dues for that employee is deducted from total taxable

wages. Lloyds deposits the monies remitted by the employer as supplemental dues in a special account. Once a month, the bank transfers the monies from the account in part to the Union (for payment of supplemental dues), and in part to the Trust Fund (for payment of additional vacation and holiday benefits), based on an allocation between monies designated as supplemental dues by employees and monies as to which there is no outstanding check-off authorization."

* * *

"[3]For each employee who has authorized a check-off of dues, the Union receives a monthly disbursement from Lloyds in payment of supplemental dues for all work performed that month by that employee for all employers. Conversely, for each employee who has not authorized a check-off, the bank transfers the amount previously designated as 'supplemental dues' to the Trust Fund for credit to the employee's vacation and holiday benefits account. The Union must obtain the supplemental dues owed by that employee in some other manner."

The Court concluded that (*Id.*, p. 7):

"In this case, the provision in the 1981 Master Agreement permitting an employer to designate a bank as its agent to receive authorizations and revocations **is a reasonable adaptation of the requirements of section 302(c)(4) to the transitory nature of employment in the construction industry.** A contractual requirement that each employee must send authorizations and revocations directly to each of the employee's employers would be impractical because an employee ordinarily works for several different employers during the course of a year."[1]

---

[1]Emphasis is added throughout this brief unless otherwise noted.

The Court said, further, that (*Id.*, pp. 8-9):

> "The dues check-off procedure of section 302(c)(4) is designed to ensure not only the 'protection of the employee' but also administrative convenience in the collection of dues. *NLRB v. Atlanta Printing Specialties and Paper Products Union 527*, 523 F2d 783, 786 (5th Cir. 1975); *Anheuser-Busch, Inc. v. International Brotherhood of Teamsters, Local 822*, 584 F.2d 41, 43 (4th Cir. 1978). **Given the transitory nature of employment in the construction industry,** we conclude that the Union cannot be expected to provide individual authorization cards to each employer with whom an employee might work; conversely, an employer simply cannot reasonably be required to make separate deductions for dues and fringe benefits from an employee's 'wages', to do the bookkeeping for such allocations, and to submit separate checks for each. **To prohibit the employers in this case from designating an agent to allocate dues and fringe benefits from employee 'wages' deductions would frustrate the legislative purpose of section 302(c)(4), since no other practical manner exists to ensure the remittance to the Union of those dues that employees have voluntarily and affirmatively authorized the employer to deduct."**

III

REVIEW ON WRIT OF CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

The decision of the Court of Appeals that the dues check-off procedure provided in the 1981 Master Agreement complied with the requirements of Section 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. § 186

(c)(4), is correct and is in accord with applicable decisions of this Court.

In construing Section 2 Eleventh (b) of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (b), which is similar in terms and purpose to LMRA Section 302(c)(4), this Court said in *Felter v. Southern Pacific Co.*, 359 U.S. 326, 79 S.Ct. 847 (1959), as follows (359 U.S. at pp. 333-335, 79 S.Ct. at pp. 853-854):

> "The structure of § 2 Eleventh (b) then is simple: carriers and labor organizations are authorized to bargain for arrangements for a checkoff by the employer on behalf of the organization. Latitude is allowed in the terms of such arrangements, but not past the point such terms impinge upon the freedom expressly reserved to the individual employee to decide whether he will authorize the checkoff in this case . . . . Of course, the parties may act to minimize the procedural problems caused by Congress' choice. **Carriers and labor organizations may set up procedures through the collective agreement for processing, between themselves, individual assignments and revocations received, and carriers may make reasonable designations, in or out of collective bargaining contracts, of agents to whom revocations may be sent.** Revocations, after all, must be sent somewhere."

The decision of the Court of Appeals gives effect to the intent of Congress, evidenced by the addition of Section 8(f) to the National Labor Relations Act in 1959, 29 U.S.C. § 158(f), that federal labor law accommodate to the transitory nature of employment in the construction industry. In so doing, the decision is in accord with this Court's holding earlier this term in *Jim McNeff, Inc. v. Todd*, ... U.S. ....., 103 S.Ct. 1753 (1983), that monetary obliga-

tions accrued under a prehire contract authorized by Section 8(f) can be enforced, prior to repudiation of the contract, in a suit brought by a union against an employer under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, absent proof that the union represented a majority of the employees.

In *Jim McNeff, Inc.*, the Court said (..... U.S. ....., 103 S.Ct. pp. 1756-1759):

> "Thus, § 8(f) allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for the workers hired by the signatory employer without the union's majority status first having been established in the manner provided for under § 9 of the Act. **One factor prompting Congress to enact § 8(f) was the uniquely temporary, transitory and sometimes seasonal nature of much of the employment in the construction industry.** Congress recognized that construction industry unions often would not be able to establish majority support with respect to many bargaining units.... Congress was also cognizant of the construction industry employer's need to 'know his labor costs before making the estimate upon which his bid will be based' and that 'the employer must be able to have available a supply of skilled craftsmen for quick referral.'
>
> • • •
>
> "Apart from not offending the concerns noted in *Higdon*, allowing a minority union to enforce overdue obligations accrued under a pre-hire agreement prior to its repudiation vindicates the policies Congress intended to implement in § 8(f). **Congress clearly determined that pre-hire contracts should be lawful to meet problems unique to the industry.** However limited the binding effect of a prehire agreement may be, it strains

> both logic and equity to argue that a party to such an agreement can reap its benefits and then avoid paying the bargained for consideration. Nothing in the legislative history of § 8(f) indicates Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall. Having had the music, he must pay the piper."

The fact that in this case the accommodation of federal labor law to "problems unique to the construction industry" was accomplished through the collective bargaining process rather than through amendment of the law does not distinguish this case from *Jim McNeff, Inc.* The collective bargaining was pursuant to the mandate of federal labor law and, as the Court of Appeals held, the solution of the problem addressed was well within the authority of the collective bargaining parties under that law (see *Local 24, International Teamsters etc. v. Oliver,* 358 U.S. 283, 296, 79 S.Ct. 297, 304; *United Mine Workers of America Health and Retirement Funds v. Robinson,* 455 U.S. 562, 102 S.Ct. 1226, 1234).

IV

CONCLUSION

For the foregoing reasons the Trust Fund respondents respectfully submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco,

July 5, 1983.

Of Counsel:
JOHNSON & STANTON

THOMAS E. STANTON, JR.
Counsel for Trust Fund Respondents